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Choice of Law for Burdens of Proof

Dale A. Nance[†]

ABSTRACT: The traditional view is that all aspects of the burden of proof are procedural, so a forum court properly employs its own law on such matters, even when comity dictates the application of another jurisdiction's substantive law to the matter in dispute. However, this has never been an entirely accurate description of practice, and there has been discernible movement toward the opposite conclusion over the last century. The matter remains in flux, with divergent judicial opinions and unhelpful rationalizations. This Article explains the discord and provides a workable rule for resolving the choice-of-law problem. The key is to recognize that the two components of the burden of proof, the burden of persuasion and the burden of production, have quite different functions. Once these functions are identified, it becomes clear that the burden of production, in both its allocation and the severity of the burden that it imposes, should be governed by forum law. But the burden of persuasion, in both its allocation and the severity of the burden that it imposes, should be taken from the jurisdiction the substantive law of which the forum court chooses to apply, whenever that burden regulates the fact-finder's inferences about an ultimate material fact. Moreover, in this context, allowing judicial discretion to modify these principles by attempting to take non-forum state purposes or interests into account is unnecessary and likely counter-productive.

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I. Introduction

Suppose a court is faced with a choice-of-law problem, and this “forum” court chooses to apply the substantive law of a foreign state on a particular issue. What law controls the burden of proof regarding the ultimate factual issues specified by the foreign law? The authorities contain no clear answer to this question, in part because it is actually many questions. Several tests have been suggested over the years, but nothing coherent has attained general acceptance. The purpose of this Article is to suggest an improvement in the criteria used to determine such choices.

Despite the enormous diversity of modern American approaches to choice-of-law problems,¹ there is one persistent feature of the present discussion. Even when interstate or international contacts necessitate a choice among sources of controlling substantive law, courts almost invariably ascribe to the proposition that local law of

¹ See generally SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006).

procedure is to be employed.² It seems obvious that an American court should not attempt to replicate the entire Austrian system of litigation, merely because the legal force of an agreement between the parties is properly governed by Austrian contract law. As a consequence, the substance/procedure distinction continues to have life, despite long standing academic criticism of it and regardless of the general approach to conflict of laws used by the forum court.³

One of the most puzzling subjects in this regard is the present topic, choices regarding various aspects of the burden of proof on the merits at trial. Burdens of proof are legal tools that inhabit the borderland of the substance/procedure distinction. The first conflict-of-laws Restatement (published in 1934) articulates the unequivocal rule that all procedural matters are governed by forum law, and nominally places all issues regarding the burden of proof on the procedural side of the dichotomy.⁴ However, in an attempt to reflect divergent case law, the first Restatement's comments allow a way to characterize (or re-characterize) a burden of proof rule as substantive. A court can do this by determining that the foreign law that governs the parties' rights and the foreign burden of proof rule related to it "are so bound together that the application of the corresponding proof rule of the forum would seriously alter the effect of the operative facts under the law of the appropriate

² See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (A.L.I. 1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 6 ("Procedure") (A.L.I. 1971). Even those jurisdictions that do not follow either Restatement generally respect this distinction. See, e.g., *Commonwealth v. Sanchez*, 716 A.2d 1221, 1223 (Pa. 1998) ("In conflicts cases involving procedural matters, Pennsylvania will apply its own procedural laws when it is serving as the forum state. In cases where the substantive laws of Pennsylvania conflict with those of a sister state in the civil context, Pennsylvania courts take a flexible approach which permits analysis of the policies and interests underlying the particular issue before the court."); see also *Tanges v. Heidelberg North America, Inc.*, 710 N.E.2d 250, 251-52, 255 (N.Y. 1999) (drawing analogous distinction).

³ See generally RICHARD GARNETT, *SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW* (2012).

⁴ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 595 (A.L.I. 1934). For matters of substantive law, the first Restatement reflects the traditional view that the forum court should select the law of the jurisdiction where a specific event occurred (like the last event necessary to produce the alleged cause of action) or where a certain status requirement was satisfied (like the place where physical property was located), the particular test being determined by the nature of the lawsuit (breach of contract, tort, recovery of property, etc.). See ROBERT L. FELIX & RALPH U. WHITTEN, *AMERICAN CONFLICTS LAW* § 54 (6th ed. 2011).

foreign state.”⁵ The main problem with this approach is that, depending on the meaning attributed to “operative facts,” every burden of proof rule either cannot or inevitably does “alter the effect of the operative facts,” making the exception incoherent.⁶ In addition, it is plausible to assume that all statutes or common-law rules are promulgated in contemplation of the applicable burden of proof rules, which would therefore be no less “inextricably bound” with them.⁷ So, in order to make this test usable, the cases supposedly following this approach tend to focus on whether the foreign burden of proof rules were adopted in connection with, or with specific reference to, a statutory alteration of rules of liability.⁸ In the end, however, that limitation is strikingly under-inclusive: some leading cases choosing non-forum proof rules simply cannot be explained on this basis.⁹

⁵ RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 595 cmt. a (A.L.I. 1934).

⁶ The obvious meaning of the phrase “operative facts” is the ultimate material facts that the law makes determinative. But the effect of such facts (*i.e.*, once taken *as* facts) cannot be altered by a proof rule, as the role of such rules is exhausted in the determination whether or not to accept those facts as true. Alternatively, the phrase “operative facts” might have been intended to refer to the fact that certain evidence is presented or to facts inferred from the evidence that nonetheless fall short of the ultimate facts. *See* WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 32-35 (Walter Wheeler Cook ed., 1923) (distinguishing between “operative” facts and “evidential” facts). But in the latter case, the very point of such proof rules is to regulate the effect of (*i.e.*, the inferences drawn from) such evidence. *Cf.* Edmund M. Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 185 (1944) (arguing that the cases in which the burden of proof is inextricably bound together with the substantive right “constitute either all or none of the litigated cases”).

⁷ The Supreme Court made this argument, well before the Restatement was issued, in the course of holding that the Federal Employer Liability Act—which was silent on the question of the burden of proof—took for granted the extant federal common-law allocations of the burden of persuasion, even when the matter is litigated in state court. *See* *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 511-12 (1915) (holding that state courts must employ federal burden allocation in such cases).

⁸ *See, e.g.*, *Fitzpatrick v. Int'l Ry.*, 169 N.E. 112, 115 (N.Y. 1929) (choosing Ontario’s burden of proof rule for its statutory comparative negligence scheme, allocating the burden of proving contributory negligence to the defendant, over forum’s rule that plaintiff must prove freedom from contributory negligence).

⁹ *See, e.g.*, *Redick v. M.B. Thomas Auto Sales*, 273 S.W.2d 228, 232-35 (Mo. 1954) (applying non-forum state’s general rule placing the burden of proving due care on the plaintiff, rather than forum’s general rule placing the burden of proving the plaintiff’s negligence on the defendant); *Precourt v. Driscoll*, 157 A. 525, 526-29 (N.H. 1931) (to same effect).

The second Restatement, published in 1971, is somewhat different. Rather than burying the “escape clause” in the comments, it places it squarely in the rule itself. Instead of making the applicability of the escape depend on whether the alternative rules would “seriously alter” the results, the determination depends on the *purpose* of the foreign state’s proof rule. Specifically, the foreign proof rule should be selected only when the “primary purpose” of that rule “is to affect decision of the issue rather than to regulate the conduct of the trial.”¹⁰ The obvious problem with this approach, aside from the usual difficulties in determining the primary purpose of a rule, is that the Restatement does not give any meaningful guidance about how to differentiate between the two purposes. What exactly is the difference between a purpose “to affect the decision” and one “to regulate the conduct of the trial”? Any proof rule that regulates the conduct of the trial can affect the decision and presumably the authors of the rule contemplate that effect. Conversely, any proof rule that affects the decision inevitably regulates the conduct of the trial, and presumably, the authors of such a rule contemplate that regulatory impact. On close inspection, the category of rules whose primary purpose is to affect the decision and that of rules whose primary purpose is to regulate the conduct of the trial, are not mutually exclusive.¹¹ As a result, cases following this approach can be explained by reference to the indicated distinction only because, like the first Restatement test, it is often practically indeterminate, allowing nearly any decision selecting a burden of proof rule to be explained by reference to it.¹²

Is there a better way to articulate the difference that the courts whose rationales are reflected in the Restatements have sought to identify? If so, can one use such an understanding to identify certain aspects of proof rules that should be governed by forum law and others that should be governed by the law of the jurisdiction

¹⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 133-34 (A.L.I. 1971). For matters of substantive law (and, in theory, for matters of procedure) the second Restatement—developed in the wake of major changes in choice-of-law theory—generally adopts the approach of identifying the law of the state with the most significant relationship to the occurrence and the parties, although the analysis is complicated by numerous presumptive or default rules as well as references to general principles of selection. See FELIX & WHITTEN, *supra* note 4, § 59.

¹¹ See *infra* Section II.

¹² See 2 MCCORMICK ON EVIDENCE § 349 (Kenneth S. Broun ed., 7th ed. 2013) (criticizing both Restatements for articulating easily manipulable criteria).

providing the indisputably substantive rules of decision? In this Article, I suggest answers to these questions. The proposed answers depend on differentiating between two distinct kinds of contemplated effects on the outcome of the trial.

First, a proof rule can express a preference for one side of the dispute over the other in regard to the decision on the merits. This, is the function associated with setting and allocating the standard of proof for the case, such as proof by a “preponderance of the evidence,” proof by “clear and convincing evidence,” or proof “beyond a reasonable doubt.”¹³ This standard and its allocation together constitute what is usually called the “burden of persuasion.”¹⁴ Given the importance of uncertainty in cases that go to trial, this kind of proof rule—inevitably prescribed for a designated class of claims or defenses—is important in giving meaningful content to the substantive law that will be applied, because it distributes the risk of error between the parties. Accordingly, it is reasonable, if not essential, for it to be governed by the law of the state providing the substantive law. This is the good sense that lies within the idea of a rule the primary purpose of which is, in the language of the second Restatement, “to affect the decision.”

Second, a proof rule can function as part of the law’s judgment about how best to reach a compromise among the various competing procedural goals of an adjudicative system. The most basic of these, and arguably the most important in this context, are maximal accuracy of decision and minimal adjudicative cost. The “burden of producing evidence,”¹⁵ (or more simply, the “burden of production”) refers to a set of rules imbedded in this compromise. Importantly, improving accuracy—which certainly affects the decision and is intended to do so—is not the same thing as allocating the risk of error: improved accuracy is important without regard to

¹³ See *id.* §§ 339-41.

¹⁴ See, e.g., *id.* There are other kinds of rules that can be part of the burden of persuasion. In particular, corroboration rules and rules requiring the testimony of more than one witness to prove some fact can change the effective burden of persuasion, provided the fact-finder is required to credit the corroborating testimony or additional witnesses. There is a long tradition of such “quantitative” requirements on proof in Roman-Canon law. See generally MIRJAN DAMAŠKA, *EVALUATION OF EVIDENCE: PRE-MODERN AND MODERN APPROACHES* (2019). There are few such rules in modern American law. The issues raised by them are discussed *infra* Section V.B.

¹⁵ See 2 MCCORMICK ON EVIDENCE, *supra* note 12, § 338.

the party that may be benefited by the improvement. However, improving accuracy generally comes at a cost. Inevitably, a legal system must decide, explicitly or implicitly, how much in terms of social resources of various kinds should be expended on improving the accuracy of decisions.¹⁶ Each jurisdiction must answer that question for itself, and the forum's answer is entitled to be respected by its courts even when applying foreign law.

This suggests a relatively simple distinguishing principle: the controlling non-forum law should include those rules specifying the burden of persuasion on the ultimately controlling facts specified by that law, while forum law should be chosen for those rules regulating the burden of production.¹⁷ This thesis is elaborated and defended in the following sections. Section I provides necessary background on the substance/procedure distinction and how it has affected choice of law for burdens of proof. Section II identifies procedural goals that can give meaning to the notion of procedural neutrality. Section III relates this notion of procedural neutrality to the typical functions of proof burdens, establishing the basic contours of the suggested choice-of-law rule. Section IV tests the resulting theory by taking a closer look at the second Restatement's provisions regarding burdens of proof and the case law that it reflects. Section V addresses complications that arise when a stated or inferred purpose or rationale does not match the standard function

¹⁶ Regulations of the burden of production address the practical optimization of evidential "weight," where that idea is understood, not in the way that lawyers usually understand it, but rather in much the way that Keynes understood it. See JOHN MAYNARD KEYNES, A TREATISE ON PROBABILITY 71-78 (1921). Whereas lawyers usually think of the weight of evidence in the between-party comparative sense (*i.e.*, which party's evidence "outweighs" the other), Keynes observed that there is a sense of weight that relates to total amount and quality of evidence considered, regardless of which side presents it or which side it favors. As a critical part of decision-making under uncertainty, attention to Keynesian weight addresses the extent to which potential evidence has been developed, a consideration that analytically precedes, and is largely independent of, another question posed to the decision-maker, *viz.*, which side of the dispute is favored by the evidence that is available to the decision-maker when a decision must be made. For a detailed examination of Keynes's notion of weight and its use in the legal context, see DALE A. NANCE, THE BURDENS OF PROOF: DISCRIMINATORY POWER, WEIGHT OF EVIDENCE, AND TENACITY OF BELIEF (2016).

¹⁷ Burdens of proof on ancillary or preliminary issues that may arise during litigation—such as the validity of service of process, the jurisdiction of the court, and choice of law—are governed by forum law. See GARNETT, *supra* note 3, at 200. The justification is straightforward: the only rules the application of which are regulated by such burdens are themselves governed by forum law.

of a burden of proof rule, argues that the latter is the better focus of a choice-of-law rule, and considers the question whether the proposed rule should be unqualified or subject to an “escape” clause that would allow the forum court to go behind the rule’s standard function to examine the “real” purpose of the proof rule. Section VI briefly notes the significance of comparable norms that exist in other countries as well as other contexts in this country where a court must make a choice of law regarding burdens of proof.

II. The Substance/Procedure Distinction and Choice of Law

A. Preliminary Observations

The substance/procedure distinction is contestable and thus manipulable.¹⁸ Indeed, some judicial opinions use the distinction as dressing for a conclusion, rather than as an analytical tool. Given the general principle that procedural issues are governed by the rules of the forum, and presented a choice between rules that could be characterized as either substantive or procedural, a court that wants to subject the issue to the forum’s regulation might ostensibly reason that a particular rule is procedural and thus is governed by forum law.¹⁹ Such reasoning has the virtue of keeping the formal distinction intact, because it is unnecessary to recognize an exception to the formal principle or to create a new category in order to achieve the court’s immediate goal. But it is then devoid of real content. It does not explain why the specific rule in question should be governed by forum law.²⁰

Moreover, many courts have made the mistake of thinking that

¹⁸ Compare Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333, 336-37 (1933) (arguing against the meaningfulness of the distinction if taken as context invariant), with D. Michael Risinger, “Substance” and “Procedure” Revisited: With Some Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions,” 30 UCLA L. REV. 189, 199-202, 206-07 (1982) (defending the coherence of the distinction, despite its complexity).

¹⁹ See FELIX & WHITTEN, *supra* note 4, § 65.

²⁰ See, e.g., *Levy v. Steiger*, 124 N.E. 477 (Mass. 1919) (applying the forum Massachusetts rule placing the burden to prove the plaintiff’s contributory negligence on the defendant, rather than the Rhode Island rule placing the burden of proving absence of contributory negligence on the plaintiff, even though Rhode Island tort law applied to the accident). The court may well have believed that the Massachusetts rule was unequivocally superior, but instead of refusing to apply the Rhode Island rule on such a “public policy” basis, it was simpler and seemingly more rule-bound to invoke the idea that the burden of proof is procedural.

what is procedural for the purpose of one kind of decision is, therefore, procedural for the purpose of another kind of decision. Thus, courts have reasoned that a certain forum proof rule should be selected because it had previously been considered procedural when the question was not choice of law, but rather the retroactive application of a rule when announced.²¹ There is no obvious reason to conclude that what is considered procedural for purposes of a retroactivity analysis must be considered procedural for the purpose of a choice-of-law analysis. Warnings to avoid such simplistic reasoning have come from numerous sources, including the U.S. Supreme Court and the drafters of the second Restatement.²² Nonetheless, the allure of the idea that the scope of legal concepts is context-independent persists, and some American courts continue to fall prey to it, including courts addressing choice of law for burdens of proof.²³

Difficulties with the substance/procedure distinction arise in part from the fact that the distinction is a relative one, in the sense that rule Y can be “procedural” relative to rule X, but at the same time “substantive” relative to rule Z. Consequently, whether rule Y is substantive or procedural depends on the rule with which one is comparing it. Consider one articulation of the distinction, still stated in some cases, which seems to reflect a simple dichotomy: “[s]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights.”²⁴ Reflection on the nature of legal obligations reveals

²¹ See, e.g., *id.* (relying on a prior Massachusetts decision addressing the constitutionality of a statute placing the burden to prove contributory negligence on the defendant).

²² *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945) (“‘[S]ubstance’ and ‘procedure’ are the same key-words to very different problems. Neither ‘substance’ nor ‘procedure’ represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.”); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. b (A.L.I. 1971).

²³ See, e.g., *Shaps v. Provident Life & Accident Ins. Co.*, 826 So. 2d 250, 254 (Fla. 2002) (relying on procedural characterization of burden allocation in forum’s retroactivity decisions in making a choice of law regarding the burden of proof); see also *Babcock v. Chesapeake & Ohio Ry. Co.*, 404 N.E.2d 265, 273 (Ill. App. Ct. 1979) (characterizing the allocation of the burden as procedural by relying on a procedural characterization of the burden allocation in the non-forum’s decisions regarding retroactivity and the scope of judicial authority to change the allocation).

²⁴ *Shaps*, 826 So. 2d at 254 (quoting *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994)).

that, by such a criterion, it would be better to describe the situation as involving a spectrum from the most substantive to the most procedural. To illustrate the point, here is a simplified list of legal rights and duties, articulated in the context of a cause of action for the negligent infliction of physical harm. The reader is invited to decide at what point in this list one has passed from “substance” to “procedure.”

1. A owes B a duty not to expose B to an unreasonable risk of physical harm.
2. If A breaches the duty in “1,” and thereby causes harm to B, A has a duty to compensate B for the harm.
3. B has a power to invoke a court’s authority to determine whether A breached the duty in “1” without properly compensating B, as required in “2.” If so, the court may award a judgment for B, affirming the duty to compensate; various rules regulate how this is done.
4. If a court gives a monetary award against A in the claim adjudicated in “3,” so that A incurs a judgment-confirmed duty to pay the monetary award, but A does not compensate B accordingly, then B has a power to invoke a court’s authority to seize A’s property in satisfaction of the award, according to various rules that determine whether, how, and when A’s property may be used to discharge A’s judgment debt to B.

By the articulation of the substance/procedure distinction quoted above, each level of this juridical scheme can be called procedural relative to those that go before it and substantive relative to those that follow it. After the first, each level concerns “the means and methods to apply and enforce duties and rights” that have been recognized at a previous level.²⁵

In the face of this conceptual complexity, if one is to insist on a dichotomy rather than a spectrum, and if one wants to limit what is considered substantive, then one may be inclined draw the line high on the analogous list for the case under consideration. Conversely, if one wants to broaden the notion of what is substantive, one may be inclined to draw the line low on the list. Examples of extreme

²⁵ It is universally accepted that issues arising at “1” are potentially subject to an appropriate choice of non-forum law: these are quintessentially substantive rights and duties. At the same time, issues arising at “4” are consistently subject only to forum law. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 600 (A.L.I. 1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 131 (A.L.I. 1971). The more difficult issues arise at “2” and “3.”

positions, especially pertinent to the present topic, are given below.

B. The Right/Remedy Confusion

For a long time, English courts resisted the idea of enforcing the law of another country, and when they finally did so in the eighteenth century, they drew the line between “1” and “2.” Identifying the substance/procedure distinction with what is actually the *right/remedy* distinction had the effect of placing any rule that specifies or determines one’s remedy for a breach of duty in the “procedure” bailiwick.²⁶ It is uncommon today for courts to identify the substance/procedure distinction with this right/remedy distinction. In particular, rules regarding the availability and proper measures of damages, injunctive relief, and other remedies are largely subject to the possible selection of non-forum law.²⁷ But obviously, that does not end the controversy. Drawing the substance/procedure cut-off line between “2” and “3” is theoretically plausible, as it marks off the point at which the judicial process becomes involved.²⁸ American courts that do this in the course of holding that all burden of proof rules on the merits of a claim are governed by forum law may thereby resolve the choice-of-law issue by fiat, controlling for that jurisdiction. But they nonetheless present obvious targets of criticism.²⁹

²⁶ See Risinger, *supra* note 18, at 190-203. Beale tried to avoid this difficulty by using the term “secondary rights” for those specified in “2” and reserving the term “remedial rights” for those specified in “3” and “4.” See JOSEPH HENRY BEALE, A TREATISE ON THE CONFLICT OF LAWS OR, PRIVATE INTERNATIONAL LAW 185-89 (1916).

²⁷ See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 372, 412, 421, 606 (A.L.I. 1934) (choosing *lex loci* to govern the measure of damages in various contexts, except when a statute of the forum specifically mandates otherwise); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 171, 207 (A.L.I. 1971) (stating choice-of-law provisions for damages in tort and for breach of contract do not treat remedies as procedural). See generally GARNETT, *supra* note 3, 295-360 (providing a detailed choice-of-law treatment of remedies, including injunctions, in common-law and civil-law jurisdictions).

²⁸ See JOHN W. SALMOND, JURISPRUDENCE 495-96 (7th ed. 1924).

²⁹ In his classic article, professor Morgan drew the theoretical line between substance and procedure at the move from “2” to “3.” Morgan, *supra* note 6, at 154 n.4. His emphasis was on the fact-finding aspect of procedural rules: “[I]t seems obvious that rules which declare legal relations when all relevant facts are treated as known because assumed or proved are different, not in degree but in kind, from those which deal only with the methods, means and machinery for making them known.” *Id.* Yet, he rightly insisted that drawing the substance/procedure line there should not end the conflict-of-laws analysis. See *id.* at 153-58.

For example, in the well-known 1919 case of *Levy v. Steiger*,³⁰ the Supreme Judicial Court of Massachusetts was required to choose between the burden of proof allocation of the forum (Massachusetts) and that of the state where the accident occurred (Rhode Island). Rhode Island followed the common-law rule, which placed the burden on the plaintiff to prove that the plaintiff exercised due care as well as the burden of proving that the defendant did not. By statute, Massachusetts had modified the common-law rule, placing the burden on the defendant to prove that the plaintiff was contributorily negligent. Using the traditional right/remedy language, and identifying it with the substance/procedure distinction, the court held that the forum rule applied.³¹ Even if one ignores the right/remedy confusion and treats the decision as drawing a line between “2” and “3,” the reasoning is rightly criticized as simplistic, avoiding any thought to choice-of-law policies. The court made no attempt to explain why the burden of proof *ought* to be considered procedural for choice-of-law purposes. And the result is plausibly criticized as creating an unacceptable incentive for plaintiffs in such cases to seek jurisdiction in Massachusetts.³² Especially under the traditional choice-of-law theory then applied by the Massachusetts court—a territorial selection of governing substantive law based on where events occurred, in this case the law of the place where the wrong occurred (*lex loci delicti*)—was intended to insure uniformity of result regardless of where the action was brought.³³

C. Vertical Choice of Law: The Impact of Erie

The Supreme Court’s 1938 decision in *Erie R. Co. v. Tompkins*³⁴

³⁰ *Levy v. Steiger*, 124 N.E. 477 (Mass. 1919).

³¹ *See id.* at 477. Similar reasoning is used in other early twentieth-century decisions. *See, e.g.,* *Chi. Terminal Transfer R. Co. v. Vandenberg*, 73 N.E. 990, 996 (Ind. 1905) (“The statute in question pertains merely to the remedy, and controls in all actions like this when prosecuted in the courts of this state, regardless of the fact that the right of action may have arisen in another jurisdiction.”); *Jenkins v. Minneapolis & St. L. R. Co.*, 145 N.W. 40, 42 (Minn. 1914) (“Error is assigned because the court charged that defendant had the burden of proving contributory negligence. Such is claimed to be contrary to the law of Iowa, where the accident occurred . . . [B]urden of proof pertains to the remedy, and is controlled by the rule in this state.”).

³² *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 63-65 (6th ed. 2010).

³³ *See* FELIX & WHITTEN, *supra* note 4, § 54.

³⁴ 304 U.S. 64 (1938).

introduced a new “vertical choice of law” regime: when federal district courts hear claims not based on federal statutory or constitutional law—for example, claims in which federal jurisdiction is based solely on diversity of citizenship—the federal court must use rules of decision as close as possible to those of the state where the federal court is located.³⁵ To be sure, the federal courts have never thought that *Erie* required them to use all the procedural rules of the state in which they sit. But, in cases where the federal court is required to decide whether to apply federal or state rules that might be characterized as either substantive or procedural, a high priority is assuring that the parties’ selection of the federal court instead of the state court does not substantially affect the anticipated result in the case. If it does, then that fact would give rise to an unacceptable degree of inequality of treatment for litigants and associated forum shopping.³⁶ Although the Supreme Court case law is hardly a model of clarity,³⁷ it has led to a very broad conception of what is substantive in this context, or at least what is to be taken together with what is undeniable substantive, extending to many issues that arise only at “3”.³⁸ In

³⁵ *Id.* at 78 (seemingly limiting the holding, however, to matters of “substantive” law). Because of this aspiration to near parity in result, the federal court must apply the conflict-of-laws principles of the state where the federal court sits rather than independent federal conflicts principles. *See Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487, 496-97 (1941). This is in stark contrast with the horizontal choice-of-law principle, universally followed with but few exceptions, that the forum court applies its own state’s conflict-of-laws principles, not those of another state. *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 5-8 (A.L.I. 1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 4-5, 7-8 (A.L.I. 1971).

³⁶ There is one obvious exception. Federal diversity jurisdiction was premised on the idea that the option to be in federal court would provide the out-of-state litigant some assurance of fair treatment, and that itself is an anticipated effect on the outcome of the case. Accordingly, it must be considered *desirable* that a foreign litigant would engage in forum selection in order to avoid local bias. On rare occasions, such bias in favor of a local citizen might be reflected in a valid legal rule as to which the federal court might be called upon to make a vertical choice of law, and in such a case the federal court should reject the state rule even though doing so likely will affect the outcome of the case and contribute to forum-shopping. *See, e.g.*, LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 295-99 (1991) (describing nineteenth century federal decisions that can be so understood).

³⁷ *See* FELIX & WHITTEN, *supra* note 4, §§ 106-107.

³⁸ *See, e.g.*, *Gasparini v. Ctr. for Human., Inc.*, 518 U.S. 415, 419 (1996) (holding that the state rule governing judicial review of jury damages awards for excessiveness applies, rather than the federal common-law rule). The principal exceptions—rules on arguably procedural matters as to which the federal courts will not defer to state law despite a likely effect on the outcome—are those in or derived from an explicit federal statute,

particular, notwithstanding the traditional “horizontal” choice-of-law principle that burden of proof rules are governed by forum law, federal courts have consistently held that most burden of proof rules are substantive for vertical choice-of-law purposes and should be governed by the relevant state law, or at least should be governed by state law whether or not they are characterized as substantive.³⁹

Under the influence of the *Erie* doctrine, a major theme in American horizontal choice-of-law scholarship has been to push for an expansive accommodation of non-forum law.⁴⁰ Some have even suggested roughly equating the substance/procedure distinction for these two choice contexts.⁴¹ However, these suggestions have not been embraced by either federal or state courts making horizontal choice-of-law decisions. In fact, when federal courts that must make a vertical choice-of-law decision turn to any horizontal choice-of-law issue that also must be addressed, they are usually

such as the Federal Rules of Civil Procedure or the Federal Rules of Evidence, see, for example, *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) (holding that federal rules of civil procedure control in federal courts adjudicating state law claims), or by important federal policies such as those supported by an explicit provision of the federal Constitution, see, for example, *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 536 (1958) (holding parties’ right to a jury trial applied in federal diversity jurisdiction cases).

³⁹ See, e.g., *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 210 (1939) (holding that, under *Erie*, the allocation of the burden of persuasion is governed by state law); *Burt Rigid Box v. Travelers Prop. Cas. Corp.*, 302 F.3d 83, 91 (2d Cir. 2002) (applying state standard of proof regarding proof of lost insurance policy). The same holds for presumptions that shift the burden of persuasion. See, e.g., *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959) (holding applicable, under *Erie*, a state presumption shifting to the life insurance company the burden of persuasion that the insured committed suicide). Congress has seemingly extended this to all rebuttable presumptions on the merits, whether they shift the burden of persuasion or only the burden of production. See FED. R. EVID. 302 (“In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.”). Whether state law governs even with respect to (non-presumption) sufficiency rules—rules that either preclude a trial judge from, or require a trial judge to, direct a verdict in the context of a given allocation and standard of proof—is a matter on which federal courts remain split. See *infra* notes 151-56 and accompanying text.

⁴⁰ The idea goes back at least to Professor Morgan. See Morgan, *supra* note 6, at 194 (“The desirability of securing identity of result in whatever forum the controversy is tried ought to be controlling except where the judicial machinery cannot effectively be operated to that end.”). Some modern treatises continue this theme. See, e.g., WEINTRAUB, *supra* note 32, § 3.2C1.

⁴¹ See, e.g., Robert Allen Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U. L. REV. 813 (1962); see also 2 MCCORMICK ON EVIDENCE, *supra* note 12, § 349.

careful *not* to equate what is procedural for vertical choice-of-law purposes with what is procedural for horizontal choice-of-law purposes.⁴² In the latter context, the legitimate interest in achieving substantial identity of result between the courts of two states, and thereby avoiding forum shopping, is a much less dominant concern.⁴³ Indeed, the diversity of choice-of-law methodologies found in the United States today makes “horizontal” forum shopping unavoidable to a considerable extent.⁴⁴ Extending the prevailing expansive accommodation of non-forum law from the vertical choice-of-law context into the horizontal choice-of-law context would allow the federalism tail to wag the private-international-law dog.⁴⁵

This Article’s suggested approach to the horizontal choice-of-law problem rejects the nominal traditional solution—*i.e.*, treating all rules concerning the burden of proof as procedural and so governed by forum law—and also rejects the extension of the prevailing vertical choice-of-law solution to horizontal choices—

⁴² One of the leading cases addressing the burden of proof illustrates this nicely. *See* *Sampson v. Channell*, 110 F.2d 754, 760 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940) (holding that, when a federal court adjudicates state law claims, the burden of proof is governed by state law, but the traditional horizontal state choice-of-law rule then employed by Massachusetts considered burden of proof procedural, so that the federal court sitting in Massachusetts had to apply the Massachusetts burden of proof rule even when adjudicating rights arising under the tort law of Maine, where the accident giving rise to the action occurred).

⁴³ *See* FELIX & WHITTEN, *supra* note 4, § 65 (“[I]t would be as great a mistake to import the *Erie-Guaranty Trust* outcome determinative test wholesale into the area of horizontal conflict of laws as it was to engage in the mechanical classification of rules as substantive or procedural under the vested rights system.”); *see also* SYMEONIDES, *supra* note 1, at 389-94 (describing the increased modern focus on protecting forum state interests as compared to assuring interstate uniformity).

⁴⁴ Modern analytical approaches to horizontal choice of law have a discernible preference for forum law. *See, e.g.*, Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 365-67 (1992). The greater this effect, the more tempting is forum shopping.

⁴⁵ As one scholar puts it:

Erie concerns arise primarily in the context of diversity of citizenship jurisdiction, where the federal court is acting as a neutral arbiter of claims that otherwise would be litigated in state court. In this instance, federal courts are much more concerned with mimicking what would occur in an unbiased state forum. This concern is not crucial to the horizontal choice of law inquiry—which is more oriented toward whether there are compelling reasons not to apply forum state law.

LAURA E. LITTLE, *CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS* 730 (Wolters Kluwer 2d ed. 2018) (footnote omitted).

i.e., treating all (or nearly all) burden of proof rules as substantive, or at least choosing them together with the undeniably substantive law to which they pertain. The proposed solution is based on an analysis of burden of proof rules themselves and the functions that they serve. This produces a different categorical distinction, rather than relying on ad hoc choices made by each forum court considering the choice-of-law factors that seem relevant. The following discussion explains that categorical distinction and then considers whether it would be wise to complicate a simple rule based on it by incorporating an escape clause, like those appearing in the Restatements. The starting point for this strategy is to identify the procedural goals that are reflected in rules regarding the burden of proof.

III. Procedural Goals as Distinctive

While the second Restatement and the case law it reflects are unsuccessful in articulating a coherent principle of horizontal choice of law regarding burdens of proof, the second Restatement's more general statements regarding the substance/procedure distinction represent an improvement over the first Restatement and the more traditional case law it reflects. Although Chapter 6 of the second Restatement is entitled "Procedure," the principal rule, § 122, wisely avoids that term. It states that "[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."⁴⁶ The key phrase, "how litigation shall be conducted," points to a nexus of considerations that each jurisdiction must face in constructing and managing a system of adjudication.

Unfortunately, the second Restatement does not identify these considerations, either in its rules or its comments. The drafters' comment on § 122 simply states that the forum has "compelling reasons" to apply its own rules about how litigation is conducted.⁴⁷ They observe that "[t]he forum is more concerned with how its judicial machinery functions and how its court processes are

⁴⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (A.L.I. 1971); *id.* cmt. b ("[T]he rules stated in this Chapter do not attempt to classify issues as 'procedural' or 'substantive.' Instead, they face directly the question whether the forum's rule should be applied.").

⁴⁷ *Id.* cmt. a.

administered than is any other state.”⁴⁸ But the only reason given for such concern is the *inconvenience* of mastering the rules of a non-forum state: “[t]he difficulties involved in doing so would not be repaid by a furtherance of the values that the application of another state’s local law is designed to promote.”⁴⁹ That makes the competing concern, that which limits an expansive application of non-forum law, sound as if it were little more than avoiding too much annoyance of the forum judges and the lawyers appearing before them. There is much more to it than that.⁵⁰

To be sure, the second Restatement does indicate some of the rules that, in accord with its stated criterion, should be taken primarily as reflecting procedural concerns. Thus, the Restatement presents categorical rules selecting forum law for matters such as “the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs,” which are readily characterized as “relating to judicial administration.”⁵¹ But when it comes to the burden of proof, the second Restatement is ambivalent: “[o]ther issues, as, for example, which side bears the burden of proof (see § 133) and which side bears the burden of going forward with the evidence (see § 134), fall into a gray area between issues relating primarily to judicial administration and those concerned primarily with the rights and liabilities of the parties.”⁵²

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Sedler, *supra* note 41, at 822-24 (distinguishing inconvenience from considerations of procedural policy and suggesting that forum courts have hesitated to incorporate analytically procedural aspects of non-forum law that can materially affect the result out of concerns about the forum’s procedural policy); cf. GARNETT, *supra* note 3, at 17-18 (criticizing the idea of “inconvenience” for its vagueness and consequent difficulty of application and potential elasticity of meaning).

⁵¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. a.

⁵² *Id.* The Restatement’s drafters were not alone in this ambivalence. Another commonly cited attempt to articulate a categorical choice-of-law distinction in the context of the rules leading up to judgment at trial is the following: “[P]rocedural rules should be classified as those which concern methods of presenting to a court the operative facts upon which legal relations depend; substantive rules, those which concern the legal effect of those facts after they have been established.” GEORGE W. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 133 (3d ed. 1963). Whatever Stumberg meant by “operative facts,” neither category he described covers rules that specify how the fact-finder is to determine what facts are to be taken as proven. A party does not “present” the ultimate facts to the fact-finder; a party presents *evidence of* those ultimate facts, from which the fact-finder must *infer* the truth or falsity of the ultimate facts, and it is just here that burden of proof rules come into the picture. See *supra* note 6.

Unfortunately, the Restatement's advice about how to handle this "gray area" is not very helpful.⁵³

For present purposes, no exhaustive discourse about procedural goals and associated procedural values is necessary.⁵⁴ The need for burdens of proof, and thus the occasion for a choice of law regarding them, presupposes that there is doubt about the material facts. Adjudication must address that uncertainty. Moreover, such uncertainty is not a static feature of adjudicated cases; it usually can be reduced by investigation.⁵⁵ Yet fact-finding in general, and investigation in particular, are time-consuming and expensive activities. Thus, pervasively important are achieving accurate results and controlling litigation costs, two goals that are often in tension,⁵⁶ a tension that must be resolved by accommodating both.⁵⁷ Beyond that, the value placed on litigant autonomy, as compared to state control, also helps to inform the selection of a more adversarial system of adjudication as compared to one more focused on active judicial investigation. If a mode of procedure is chosen that allows the parties to select and control what is presented to the tribunal, additional rules of discovery, disclosure, and admissibility tend to arise in order to regulate the parties' presentations, again in an effort to get acceptably accurate results at an acceptable cost.⁵⁸ Further, if

⁵³ Aside from deferring to established precedent, especially when that might create expectations by the transacting parties, the drafters suggest considering "whether the issue is one whose resolution would be likely to affect the ultimate result of the case." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. a. The problem remains: if it did not have such potential, a party would be unlikely to raise it.

⁵⁴ See generally PROCEDURAL JUSTICE (Klaus F. Röhl & Stefan Machura eds., 1997); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

⁵⁵ In addition to the instrumental value accuracy serves, by facilitating the achievement of substantive policy goals, it also has value as an end in itself: we want our verdicts to be truthful. Not surprisingly, the two goals are functionally related. Augmenting the quantity and quality of relevant evidence has been shown both to decrease expected error (increase expected certainty) and (as a consequence) to increase expected utility of decision-making under uncertainty. See NANCE, *supra* note 16, at 111-17, 253-70.

⁵⁶ Litigation rules reflecting mere "convention" show that they are not always in tension. For example, it may not matter in any way whether court papers are filed on letter-sized paper (8.5 in. x 11 in. in the U.S.) or on legal size paper (8.5 in. x 14 in.), but choosing one or the other and sticking with it reduces litigation costs.

⁵⁷ See *Barron v. Ford Motor Co. of Can., Ltd.*, 965 F.2d 195, 199 (7th Cir. 1992) ("A pure rule of evidence, like a pure rule of procedure, is concerned solely with accuracy and economy in litigation and should therefore be tailored to the capacities and circumstances of the particular judicial system . . .").

⁵⁸ See generally Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227

the mode of fact-finding selected values the involvement of lay persons as decision-makers, as in jury trials, rules must accommodate a bifurcated trial court and the costs thereof. This complex of considerations determines the procedural goals of a system of adjudication.⁵⁹ Any particular legal system must reach an accommodation of the tensions inherent in these goals and the values that they represent.⁶⁰ It is that accommodation—not just the time and energy of judges and counsel in grappling with foreign law—that is entitled to be respected even when the forum court chooses to apply the law of another state or country.

This brief analysis facilitates reconstructing the second Restatement's cryptic distinction between burden of proof rules designed "to affect decision of the issue" and those designed "to regulate the conduct of the trial."⁶¹ Only those foreign proof rules designed to affect the decision *in a certain way* should be chosen together with the associated foreign rules of tort, contract, and so forth. These are proof rules designed to affect the decision by going beyond merely specifying the system's accommodations of accuracy and litigation cost; party autonomy and state control; lay participation and professional judgment; and so forth. These are rules that try to affect the decision not by merely making it more accurate, less expensive, or by making it more attuned to the common sense of lay jurors. They are rules designed to specify the degree to which the law favors a decision for one side of the dispute

(1988). Not all rules usually placed in these categories serve only or primarily such functions. For example, privilege law affects admissibility but constitutes a part of the law of privacy itself, and when a person consults a professional, for example, the understandable expectations of confidentiality are usually a function of where the communication takes place. This can rightly result in the application of non-forum law. *See, e.g., Ford Motor Co. v. Leggat*, 904 S.W.2d 643, 646-47 (Tex. 1995) (applying the second Restatement).

⁵⁹ *See generally* MIRJAN DAMAŠKA, *FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (Yale University Press 1986).

⁶⁰ This accommodation is worked out by a process of evolution as much as it is a product of explicit planning. Adjudicative systems are, to a significant extent, spontaneously generated, adaptive orders. *See* Ronald J. Allen, *Taming Complexity: Rationality, the Law of Evidence and the Nature of the Legal System*, 12 L., PROBABILITY & RISK 99, 100-04 (2013). By some accounts, the resulting differences in procedural law between countries are often greater than the differences in substantive law. *See, e.g., Andreas F. Lowenfeld, Introduction: The Elements of Procedure: Are They Separately Portable?*, 45 AM. J. COMP. L. 649, 652 (1997).

⁶¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 134 (A.L.I. 1971); *see also, supra* notes 10-12 and accompanying text.

over the other, one (dispute-specific) class of litigants over another.⁶²

Of course, to say that a rule “favors” one class of litigants is not to say that it is inherently unfair, as there may be good reasons for doing so. Indeed, that feature describes the difference between any distinct substantive rules on the same subject. For example, if one compares a regime of negligence liability for defective products to a regime of strict liability for such products, the difference lies in the extent to which the law favors recovery by plaintiffs who have suffered harm. One solution may be better or more just than the other, but neither can be criticized for merely expressing the law’s policy judgments or preferences in that regard. Conversely, what distinguishes true procedural rules is that they do *not* do this.

Some will object that *all* choices about rules of procedure favor one side over the other, which means that all rules about the burden of proof do as well.⁶³ Thus, my claim presupposes what some think is an entirely elusive concept of *procedural neutrality*. To be sure, putting aside choice-of-law questions, most choices of a procedural rule have systemic effects of some kind, relative to the status quo ante or to alternative rule choices, effects that in principle can be identified and described as favoring one class of litigants over another. Here, however, lies the significance of the second Restatement’s reference to *primary* purpose.⁶⁴ Rule-makers can

⁶² In the Restatement, this idea perceptibly surfaces only in one of the illustrations provided by the drafters. They considered the application of a statute interpreted by the courts of state X, in which it was enacted, as placing the burden of persuasion on an employer to prove that an injury to an employee occurring during the scope of employment was not caused by the employer’s negligence. The drafters state: “This statute, as so interpreted, will be applied in an action brought by [an employee] in a court in state Y to recover for his injuries [in state X] if the Y court finds, as it probably will, that the X statute was primarily designed to affect decision of the issue of the employer’s negligence *in favor of the injured employee*.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 133 illus. 5 (A.L.I. 1971) (emphasis added). But the drafters give no indication that it is just *this* kind of effect on the decision that triggers deference to non-forum law.

⁶³ See, e.g., Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 875, 891-92 (2011) (illustrating this claim by reference to the effects of adopting a rule requiring one size of paper instead of a rule adopting another size, and arguing that such choices do have an effect on classes of litigants, even if it is a very small one). Professor Tidmarsh does not specifically address the point of my example (see *supra* note 56), because he considers the choice between one uniform size or another and thus ignores the main practical question really encountered, namely, whether to have *some* uniform rule, a convention, or else to allow parties to file on whatever size of paper they choose.

⁶⁴ See *supra* note 10 and accompanying text.

pursue neutral procedural goals even when the effort to do so has potentially identifiable secondary effects that favor plaintiffs or defendants or subclasses thereof. They might or might not be aware of such effects when selecting a rule, and if they are aware, they might or might not approve of such effects. However, in neither case does that make such effects the primary purpose of the rule. Thus, a rule adopted with the purpose of reducing litigation costs is a rule in service of a neutral procedural goal. This remains the case even though it may be true that, at least insofar as those costs are private costs and are not disproportionately saved by defendants, selecting that rule might make litigation more attractive and thus favorable to potential plaintiffs. Similar comments pertain to increasing accuracy of verdicts and to the other aspects of the accommodation described above.⁶⁵

Not only does the phrase “to affect the decision of the issue” sweep too broadly to identify only that which should be taken as substantive for choice-of-law purposes, but the phrase “to regulate the conduct of the trial” sweeps too broadly to identify only that which should be taken as procedural for choice-of-law purposes. To put a fine point on it, *all* burden of proof rules are designed to regulate the conduct of the trial; one might call this their *immediate* purpose. What differentiates them is what might be called their *intermediate* purposes. Some burden of proof rules are intended to regulate the conduct of the trial for the intermediate purpose of

⁶⁵ Cf. Martin Illmer, *Neutrality Matters—Some Thoughts About the Rome Regulations and the So-Called Dichotomy of Substance and Procedure in European Private International Law*, 28 CIV. JUST. Q. 237 (2009). In the context of the European Union and choice-of-law rules for member states, Illmer draws a similar distinction between rules merely “affecting the decision on the merits” and those “concerned with the decision on the merits,” with only the latter being referred to the *lex causae*, potentially the law of a non-forum state. *Id.* at 246. Unfortunately, he explains this distinction by writing, “only those issues which are *directed at* the decision on the merits reached by the court are *concerned with* that decision.” *Id.* (emphasis added). This suggests that a rule “directed at the decision on the merits” must be non-neutral. Further, he writes, “[n]eutrality is determined by the abstract nature of the matter in question, not by reference to the concrete case.” *Id.* Abstraction, however, is not the key; rather, the key is whether the rule is designed to adjust the law’s degree of preference for a result favorable to one side rather than the other. The rules at issue invariably are articulated in abstract terms, so as to apply to a range of cases, so the abstractness of the rule’s focus does not provide a useful criterion. More importantly, rules designed to improve accuracy regardless of which party or class of litigants is thereby favored are neutral procedural rules, a conflict about which should be controlled by *lex fori* rather than *lex causae*, but they are certainly rules that are both “concerned with” and “directed at” the decision on the merits.

expressing the degree of preference for one class of litigants over another in handling unresolved uncertainty. Some burden of proof rules are intended to regulate the conduct of the trial for the intermediate purpose of achieving a balance of procedural goals, including the reduction of uncertainty before a decision must be made. Neither of these purposes is *ultimate*, of course, as the ultimate legitimate purpose of each is doing justice according to law. It is with reference to these intermediate purposes that the question meaningfully can be raised: Which is primary? Unfortunately, this is not the way the Restatement articulates the matter.

Of course, it is commonplace today to acknowledge that what are usually understood as procedural rules can be adopted for substantive purposes, and conversely substantive rules can be adopted to pursue what are procedural goals.⁶⁶ These complications are addressed later.⁶⁷ A more fundamental challenge to a distinction based on the notion of procedural neutrality is presented by the observation that substantive rights and liabilities are adopted with a particular procedural framework in mind, so that any attempt to separate one from the other in the choice-of-law context will result in the distortion of the scheme contemplated by the promulgator of the substantive rights and liabilities.⁶⁸ There is certainly truth in this observation,⁶⁹ but the question is what to make of it. To some, it suggests that a forum court that does not wholly reject the application of the non-forum law should embrace as much of the non-forum law as possible, regardless of its characterization as substantive or procedural.⁷⁰ But this fails to take into account the other side of the matter: not only can separating non-forum substantive law from its associated (non-forum) procedures distort the former, but *failing* to separate them can distort the procedural goals of the forum state. So long as there are identifiable procedural goals, and so long as the accommodations made among procedural goals vary across jurisdictions, any decision by one state to apply the law of another state will encounter this double-edged problem.

⁶⁶ See, e.g., Risinger, *supra* note 18, at 204-11.

⁶⁷ See *infra* Section V.

⁶⁸ See, e.g., Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U.L. REV. 801, 802 (2010).

⁶⁹ See *supra* note 7 and accompanying text.

⁷⁰ See Main, *supra* note 68, at 830-37.

The question is how practical lines can be drawn to minimize *both* kinds of distortion. In the case of burdens of proof, I argue, this is done by attending to the typical functions of distinct burdens.

IV. Choice of Law and the Functions of Proof Burdens

To make progress on choice-of-law questions regarding the burden of proof, one must identify the distinct functions that are served by rules regarding the burden of proof and how those functions relate to substantive and procedural goals. In an adversarial system, these functions are served by two distinct aspects of the burden of proof, usually called the burden of persuasion and the burden of production.⁷¹ Each of these burdens has two components: (1) rules allocating the burden between the parties; and (2) rules specifying the “severity” of the burden so allocated, that is, what and how much the burdened party must do to meet the burden.⁷²

A. Functions of the Burdens of Proof

The burden of persuasion regulates the final decision of the trier-of-fact, whether that is a jury or the trial judge in a bench trial. Its two components are: rules specifying the strength of evidence (or *standard of proof*) required to establish an ultimate question of fact; and rules allocating the risk that the fact-finder will not be persuaded one way or the other according to that prescribed standard. The burden of persuasion is set by law, communicated to jurors (if a jury is used) by way of jury instructions, and applied by the fact-finder.⁷³

This burden reflects how the law chooses to allocate the risk of

⁷¹ See ROGER C. PARK, DAVID P. LEONARD, AVIVA A. ORENSTEIN, DALE A. NANCE, & STEVEN H. GOLDBERG, *EVIDENCE LAW: A STUDENT’S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS* § 2.02 (4th ed. 2018).

⁷² It is potentially more complicated than that. For example, if a verdict for the plaintiff requires clear and convincing evidence that X is true, it is logically possible for the risk of non-persuasion regarding X to be allocated either to the plaintiff or the defendant. If “clear and convincing evidence that X” is interpreted as a probability of X that is higher than some threshold like 0.67 (2:1 odds) or 0.75 (3:1 odds), then the fact-finder must have a rule about which side wins if the fact-finder is unable to decide whether or not that threshold has been surpassed. In principle, this risk of non-persuasion could be assigned to the defendant. Nevertheless, invariably the risk of non-persuasion falls on the party disfavored by such a heightened standard.

⁷³ See PARK ET AL., *supra* note 71, § 2.03.

error that has not been eliminated by the evidential process, including discovery, the presentation of evidence, and the analysis of that evidence.⁷⁴ For example, criminal cases have a high standard of proof on most issues, in order to allocate the risk of error disproportionately (though not completely) onto the prosecution. Civil cases, on the other hand, generally treat the parties relatively equally in this regard, on the theory that an error in favor of the plaintiff is not significantly worse than an error in favor of the defendant.⁷⁵ There are, however, some examples of “disfavored” claims, usually where fraud or malice is alleged, for which a heightened standard of proof applies, often called proof by “clear and convincing evidence.”⁷⁶ In addition, whatever the standard of proof selected, the allocation of the resulting burden establishes the risk of non-persuasion: it prescribes which side wins when the fact-finder is unable to resolve whether or not the standard of proof has been surpassed.⁷⁷

The burden of production, on the other hand, regulates the respective roles of the trial judge, the parties, and the fact-finder with regard to the presentation and evaluation of evidence.⁷⁸ This burden also has two components: rules that specify what is sufficient or what is not sufficient to satisfy the burden; and rules allocating the burden between the parties. Sometimes referred to as the burden of producing evidence or the burden of going forward, this burden comes into play when one party claims that the other party has not offered sufficient evidence to merit continuing with the case as to a particular issue or claim, so that the judge must grant a motion for a preemptive determination at that point.⁷⁹ Of

⁷⁴ See NANCE, *supra* note 16, at 16-42 (elaborating the risk-of-error understanding of burdens of persuasion).

⁷⁵ If the usual civil standard is interpreted as requiring proof on the balance of probabilities, then choice of that standard also arguably serves a purely procedural goal, namely accuracy, because decisions made on the balance of probability, minimize the expected number of erroneous decisions. See David H. Kaye, *Clarifying the Burden of Persuasion: What Bayesian Decision Rules Do and Do Not Do*, 3 INT'L J. EVID. & PROOF 1, 6-13 (1999). This, however, is not the dominant relationship between proof burdens and accuracy; the primary assurance of accuracy is the adequate development of the evidence, a concern that underlies the burden of production. See NANCE, *supra* note 16, at 178-80.

⁷⁶ See 2 MCCORMICK ON EVIDENCE, *supra* note 12, § 340.

⁷⁷ See NANCE, *supra* note 16, at 3-4 (commenting on factors considered in allocating the burden).

⁷⁸ See PARK ET AL., *supra* note 71, § 2.02.

⁷⁹ See *id.*

importance to choice of law considerations is the fact that the burden of production works very differently in adversarial adjudicative systems—where the parties are tasked to discover, sort, and present evidence to the court—than it does in adjudicative systems where parties do not have that role because magistrates select what evidence to develop and consider.⁸⁰

Whereas the burden of persuasion rarely shifts from the party initially burdened to the opponent and necessarily continues into the fact-finder's deliberation, the burden of production can shift during the trial, and its force is usually expended in determining whether the case is properly one for the fact-finder to determine.⁸¹ For the burden of production, there are a number of rules (rules of “sufficiency”) determining the severity of the burden.⁸² The most conspicuous sufficiency rule is that, when a preemptive motion is made at an appropriate point in the proceeding,⁸³ the evidence must be strong enough to permit a reasonable fact-finder to find the contested fact in favor of the non-moving party; otherwise, the court will grant the preemptive motion and summarily determine that particular fact.⁸⁴ Differences exist among jurisdictions about how exactly this test is articulated and about the contours of subsidiary rules.

For example, most states employ some version of the so-called “single witness” rule: the testimony of a competent witness that the witness observed an event occur in a certain way is usually sufficient to permit a reasonable fact-finder to infer that the event occurred in that way.⁸⁵ Put differently, when the only issue that a jury must decide is whether to believe a competent witness, the jury

⁸⁰ See NANCE, *supra* note 16, at 187 (noting that in relatively non-adversarial systems, where judicial magistrates have the responsibility of collecting evidence, the burden of production is on the magistrate, and parties challenge the inadequacy of the magistrate's work by appeal).

⁸¹ See PARK ET AL., *supra* note 71, at 42-45.

⁸² See 2 MCCORMICK ON EVIDENCE, *supra* note 12, § 338.

⁸³ The name and timing of the procedural motion used to test the burden of production varies: it can be by summary judgment motion, by a motion for a directed verdict (or nonsuit), or (in the language of the federal courts) a motion for involuntary dismissal (in bench trials) or for judgment as a matter of law (in jury trials). See, e.g., FED. R. CIV. P. 41(b), 50(a). It can, however, also, be raised after a jury verdict by a motion for a judgment *non obstante veredicto*. See, e.g., FED. R. CIV. P. 50(b).

⁸⁴ See PARK ET AL., *supra* note 71, § 2.06 at 45-46.

⁸⁵ See *id.* at 48-49.

is entitled to make that decision either way without judicial interference. But there are differences among jurisdictions in how this test is articulated and applied.⁸⁶ As another example, most jurisdictions hold that a proponent who bears the burden of production may *not* satisfy it by providing only the testimony of a witness who *denies* that proposition. The proponent will not be heard to argue that the jury should be free to disbelieve the witness and thus find the proposition to be true; to do otherwise would provide proponents bearing the burden of persuasion with a ready vehicle for avoiding judicial oversight (namely, calling an adverse witness).⁸⁷ Again, there is variation in how this principle is applied.⁸⁸

Contrary to what has sometimes been asserted by conflicts scholars,⁸⁹ such rules and rulings on the sufficiency of evidence do much more than simply regulate the order in which the plaintiff and defendant present their sides of the case, even when evidence is readily available. They regulate the conduct of the judge, the parties, and the fact-finder in a way that each jurisdiction considers appropriate to improve accuracy, to efficiently terminate weak cases, and, at the same time, to respect the role of lay juries when they are involved. Take, for example, “permissive inference” rules, like the single witness rule or (according to its usual interpretation) *res ipsa loquitur*.⁹⁰ Why would such rules be thought necessary? There are two main reasons. First, trial judges might be tempted to take cases from juries that appellate courts or legislatures think should be decided by juries.⁹¹ In such cases, a permissive inference

⁸⁶ Compare, e.g., CAL. EVID. CODE § 411 (“Except where additional evidence is required by statute, the direct evidence of one witness *who is entitled to full credit* is sufficient for proof of any fact.” (emphasis supplied)); with *Thompson v. City of Corsicana Housing Auth.*, 57 S.W.3d 547, 555-58 (Tex. 1993) (holding that summary judgment may not be based on the movant’s attack on the credibility of the non-movant’s witness). See generally FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE § 7.11 (3d ed. 1985).

⁸⁷ See, e.g., *Dyer v. MacDougall*, 201 F.2d 265, 268 (2d Cir. 1952).

⁸⁸ See PARK ET AL., *supra* note 71, § 2.06 at 46-48.

⁸⁹ See, e.g., Sedler, *supra* note 41, at 856 (asserting that the allocation of the burden of production will not materially affect the outcome if evidence is readily available, because “the burden merely ‘affects the order in which the plaintiff or defendant presents his side of the case’” (quoting GEORGE W. STUMBERG, CONFLICT OF LAWS 156 (2d ed. 1951))).

⁹⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 135 cmt. b (A.L.I. 1971).

⁹¹ The trial judge’s inclination might be based on doubts about the jury’s competence

rule involves legislatures or appellate courts regulating the conduct of trial judges. Second, because of the formal setting, jurors might be tempted to think that it is their duty to be highly “technical,” erroneously assuming, for example, that purely circumstantial evidence is invariably inadequate.⁹² In such cases, trial judges may seek to “liberate” jury behavior by giving a permissive inference jury instruction, in order to remind jurors not to leave their common-sense at home.⁹³ These are just the most obvious considerations. Their perceived significance will vary from jurisdiction to jurisdiction, depending on the nature and quality of jury pools and of rules and local practices regarding discovery as well as litigant and lawyer conduct.

Notice that monitoring judge/jury relations is not the only concern of the rules that structure the burden of production, nor are those concerns exhausted by including efficiency in regard to the termination of meritless cases. One way to illustrate this is to consider the following hypothetical situation. Suppose that neither the plaintiff nor the defendant presents any evidence, after which the defendant moves for a directed verdict. If one thinks of the burden of production rules as only eliminating cases where reasonable jurors could not disagree, then this sort of case might or might not be an appropriate case for a directed verdict. Whether defendant’s motion should be granted would depend on whether reasonable jurors could decide the case in favor of the plaintiff. Tried cases tend to be close, and a variety of undisputed facts about

to address an issue, or on a party’s failure adequately to develop the evidence concerning that issue, or simply on the prospect of wasting judicial resources when the jury’s proper decision is obvious. Appellate courts or legislatures can weigh these considerations differently, resulting in the intervention in the usual process that is the permissive inference rule.

⁹² Of course, circumstantial evidence is often sufficient to support a verdict. See PARK ET AL., *supra* note 71, § 2.06 at 48.

⁹³ On the importance of fact-finders’ background knowledge and beliefs in understanding the evidence presented and the considerations relating to limits that might be placed on jurors in this regard, see John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395 (1985). Of course, there is another possible explanation of the appearance of such permissive inference rules in jury instructions: judicial confusion about roles. A rule designed only to control the trial judge might be mistaken by the trial judge as a rule that needs to be communicated to the jury. Such an instruction might still serve to liberate the jury in the manner described in the text, or it might just be unnecessary verbiage that invites an appeal by a losing party on the ground that it involves the judiciary improperly encouraging a particular verdict by the jury.

the case will have been communicated during jury selection and other parts of the pre-trial process.⁹⁴ As a result, such a case might be one on which reasonable jurors could decide in favor of the plaintiff, certainly under the conventional preponderance of the evidence standard. Yet, it is commonly understood that, in such a case, the defendant's motion would (and should) be granted, regardless of what a reasonable jury might conclude about which side is more likely to be in the right.⁹⁵ Why? Simply put, a case in which no formal evidence is presented is a case for which the evidence is unreasonably incomplete. It provides very little on which the jury or even a judge can base its decision, when surely more could be provided.⁹⁶ As this example suggests, courts have used preemptive rulings against the party bearing the burden of production as a means of insisting on the presentation of available but missing evidence, even though it is rarely articulated in such

⁹⁴ With regard to the plethora of undisputed facts that are communicated to jurors prior to the calling of witnesses, see NANCE, *supra* note 16, at 95-101.

⁹⁵ See, e.g., JAMES & HAZARD, *supra* note 86, § 7.7.

⁹⁶ The example in the text may seem far-fetched. After all, why would there be no evidence? One interesting example is provided by the famous case of *Slade v. Morley*, 76 Eng. Rpt. 1074 (K.B. 1602) ("Slade's Case"). The case is known for its confirmation of the use of the action of *assumpsit* to recover for breach of a wholly executory contract. Its evidentiary posture has been succinctly described:

Slade, the plaintiff, alleged an unwritten contract between himself and the defendant; there was a straightforward "your word against mine" situation, with very little evidence on either side to weigh. Coke appeared for Slade, Bacon for the defense. Hitherto, the defendant could normally win such a case by compurgation, but Coke's argument, ultimately accepted, was that a simple matter of fact was at issue, so that a trial by jury was appropriate. Since English law did not admit the parties as competent witnesses, the jury was effectively being asked to decide the case on zero evidence.

JAMES FRANKLIN, *THE SCIENCE OF CONJECTURE: EVIDENCE AND PROBABILITY BEFORE PASCAL* 62 (2001). In fact, the plaintiff won the case with a jury verdict, which was approved on appeal, and this is thought to have led to the passage of the English Statute of Frauds. See, e.g., K.M. Teeven, *Seventeenth Century Evidentiary Concerns and the Statute of Frauds*, 9 ADELAIDE L. REV. 252, 252 (1983). Of course, if the same case arose today, the parties would be competent witnesses. See PARK ET AL., *supra* note 71, § 8.01. But that does not necessarily mean that either would testify voluntarily, as is illustrated by the fact that criminal defendants often choose not to testify; by testifying, a party becomes subject to impeachment with evidence that often would not otherwise be admissible. See *id.*, § 11.01. In such a setting, an anticipated risk of a directed verdict for the defense at the close of the plaintiff's case serves to require testimony for the plaintiff, and (given such testimony) an anticipated risk of a directed verdict for the plaintiff at the close of the defendant's case serves to require testimony for the defendant. A similar dynamic would apply if both parties were inclined to present *unnecessarily* meager evidence.

terms.⁹⁷ When thus used, the point of improving the “weight” of the evidence is that it increases the expected accuracy of the decision, an epistemic good regardless of which side ultimately prevails.⁹⁸

So, the burden of persuasion and the burden of production perform quite distinct functions. Yet this is easily overlooked. It is easy to think of the burden of production as merely ancillary to the burden of persuasion because of certain close connections between the two. These connections, and the resulting confusions, will be addressed in the context of considering the implications of the foregoing insights for choice-of-law decisions.

B. Choice-of-Law Implications

1. The Burden of Persuasion

As described above, the burden of persuasion’s two components express the law’s preference about which side should benefit from the uncertainty that remains at the end of the assessment of the evidence. If any aspects of the burden of proof should be governed by the pertinent non-forum law, these are the best candidates.⁹⁹ Indeed, the substantive elements and their associated persuasion burdens are so closely related that some courts fail to distinguish between the two, calling a difference in *what* must be proved a difference in “the burden of proof.”¹⁰⁰ Of course, a difference in what must be proved does not entail a difference in who must prove it or by what standard. Strictly speaking, the burden of persuasion is the same for two jurisdictions when, to obtain relief in a certain context, one of them requires the plaintiff to prove defendant’s negligence by a preponderance of the evidence and the other requires the plaintiff to prove the defendant’s malicious intent by a

⁹⁷ See NANCE, *supra* note 16, at 201-12 (discussing illustrative cases and a variety of arguments against understanding the burden of production in this way).

⁹⁸ See *supra* note 55 (noting how augmenting relevant evidence contributes to both the instrumental and intrinsic value of accuracy).

⁹⁹ See Sedler, *supra* note 41, at 858 (noting that there is “no procedural policy of the forum that is adversely affected if the locus’ burden of proof rule is used” by the forum). See also Risinger, *supra* note 18, at 205-06 (identifying rules needed because of the lack of omniscience of decision-makers and concluding that the burden of persuasion is a theoretically procedural rule nonetheless “stemming from what is essentially a substantive decision”).

¹⁰⁰ See, e.g., *Raskin v. Allison*, 57 P.3d 30, 34 (Kan. Ct. App. 2002) (referring to a difference between two jurisdictions in the elements that must be proved as a difference in the “burden of proof”).

preponderance of the evidence. Nevertheless, either kind of difference—a difference in the elements that must be proved, or a difference in the burden of persuasion for them—reflects the law’s judgments about the manner or extent to which one class of litigants should be favored as compared to opponents.¹⁰¹

Section I included the reminder that it is dangerous to assume that the line drawn between what is substantive and what is procedural is context-independent.¹⁰² It should not be assumed, however, that how this distinction is to be drawn in one context is wholly *irrelevant* to how it is to be drawn in another. After all, the uses of the distinction bear important similarities, especially when the contexts compared all involve choice-of-law decisions. In this regard, it is important to observe that the United States Supreme Court has consistently placed the burden of persuasion on one side of this divide in various choice-of-law contexts. This was mentioned above with regard to the *Erie* context.¹⁰³ The same is true in so-called “reverse-*Erie*” cases, those in which state courts adjudicate federal claims.¹⁰⁴

What is more, the same result obtains in choice-of-law contexts where there is no comparable need to closely mirror the result of the non-forum legal institution. For example, bankruptcy courts are

¹⁰¹ See, e.g., Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985) (reaffirming the availability of punitive damages in tort cases, but limiting such to cases of malice—as compared to the previously prevailing gross negligence standard—and requiring proof by clear and convincing evidence of such malice—as opposed to the previously prevailing preponderance of the evidence standard).

¹⁰² See *supra* notes 21-23 and accompanying text.

¹⁰³ See *supra* note 39 and accompanying text; see also Bank of America Nat. T. & S. Ass’n v. Parnell, 352 U.S. 29, 32 (1956) (applying *Erie* principle to diversity jurisdiction litigation between private parties involving alleged conversion of federal bonds even though federal law controlled whether bonds were overdue, and holding that burden of proof on good faith of defendants follows the controlling state law regarding conversion).

¹⁰⁴ See, e.g., Garrett v. Moore-McCormick, 317 U.S. 239, 246 (1942) (holding that a state court adjudicating a federal admiralty claim must use the federal rules on allocation and severity of the burden of persuasion regarding the validity of a release signed by the plaintiff); Southern R. Co. v. Prescott, 240 U.S. 632, 640 (1915) (applying, in case of loss due to fire, federal common law to allocate the burden of persuasion on issue of carrier’s negligence to the party alleging such negligence; holding that state law, which placed burden on carrier/bailee to prove due care, did not apply, even though the trial of the issue occurred in state court); Central Vermont R. Co. v. White, 238 U.S. 507, 512 (1914) (holding that the federal common-law burden, allocated to defendant, to prove contributory negligence, controls in action brought in state courts to enforce liability under the Federal Employers’ Liability Act).

specialized federal courts that address and manage the obligations of insolvent debtors under federal law. Insofar as they must determine the validity of debts arising under state law, however, the issue can be presented whether state or federal burdens of proof control. In *Raleigh v. Illinois Department of Revenue*,¹⁰⁵ noting that the basic federal rule in bankruptcy is that “state law governs the substance of the claims,”¹⁰⁶ the Court held that any bankruptcy practice placing the burden of persuasion on the creditor to show the validity of a claim must yield to state tax law placing the burden of persuasion regarding a tax claim on the taxpayer, represented by the trustee in bankruptcy.¹⁰⁷ In the course of so holding, the Court stated, “the burden of proof is an essential element of the claim itself.”¹⁰⁸ As indicated in the precedents upon which the Court relied, this somewhat paradoxical statement makes sense in that the allocation of the burden of persuasion determines whether a given ultimate material fact is part of the plaintiff’s *prima facie* case or rather part of an affirmative defense.¹⁰⁹

While such results seem correct, the Court’s reasoning begs the question, for it does not explain why a particular fact’s being part of the *prima facie* case, rather than an affirmative defense, is important or determinative for choice-of-law purposes.¹¹⁰ The Court’s justification may nonetheless be based on a valid intuition that the allocation and severity of the burden of persuasion have considerable and generally contemplated effects on the strength of the law’s expressed preferences between classes of litigants. Not taking such rules into account can alter such preferences significantly. This speaks not only to uniformity of decisions across

¹⁰⁵ 530 U.S. 15 (2000).

¹⁰⁶ *Id.* at 20.

¹⁰⁷ *Id.* at 26.

¹⁰⁸ *Id.* at 21.

¹⁰⁹ This is perhaps plainest in *Central Vermont R. Co. v. White*, 238 U.S. 507, 512 (1914), which was cited in *Garrett v. Moore-McCormack*, 317 U.S. 239, 249 (1942), and then cited in *Raleigh*, 530 U.S. at 21. As reliance on *Central Vermont* illustrates, this association of the burden of persuasion with what is undeniably substantive law pre-dates the *Erie*-doctrine and its concern that federal courts mirror state law. In fact, prior to *Erie*, under the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), federal courts sitting in diversity consistently chose the burden of persuasion rule associated with the controlling substantive law. See, e.g., *Sampson v. Channell*, 110 F.2d 754, 754-5 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940) (noting the pre-*Erie* decisions).

¹¹⁰ See Morgan, *supra* note 6, at 185-87.

forums, but also to the optimal effectuation of the policy of the substantive rules being applied.

To take an extreme but important example, it is commonly believed that Continental civil-law jurisdictions, by often failing to specify explicit standards of proof, grant substantial discretion to the fact-finding magistrate to select a standard of proof in particular cases.¹¹¹ To the extent that this is so, this practice has been criticized on the grounds that it has the potential to allow the magistrate effectively to work major changes in the substantive law.¹¹² To put this in the context of a choice-of-law problem, suppose a state ordinarily permitting that kind of discretion about proof standards chooses, in a particular case, to apply the substantive law from a state that would impose liability only in the case of a defendant's negligence and would place on the plaintiff the burden of proving the defendant's negligence by a preponderance of the evidence. If the forum court deploys its usual local discretion to craft an ad hoc rule favoring the plaintiff so long as the probability of negligence exceeds the minuscule, then for practical purposes, the forum court has converted negligence liability into strict liability.¹¹³

Recognizing the interdependence of the elements of substantive claims and defenses with the allocation and severity of the burden of persuasion, and acknowledging that both sets of rules express policy preferences between classes of litigants, argue strongly for choosing the relevant foreign law rules regarding that burden whenever a forum court chooses to apply foreign law.¹¹⁴ It is a

¹¹¹ See generally Michelle Taruffo, *Rethinking the Standards of Proof*, 51 AM. J. COMP. L. 659, 666-69, 672-73 (2003) (explaining that most civil law jurisdictions do not specify a standard of proof for civil cases and observing that, in such jurisdictions, the burden of persuasion "is considered a matter of substantive law, not [a] matter of procedural law"). Cf. Moritz Brinkmann, *The Synthesis of Common and Civil Law Standards of Proof Formulae in the ALI/UNIDROIT Principles of Transnational Civil Procedure*, 9 UNIF. L. REV. 875 (2004) (emphasizing the context-variability of both common-law and civil-law standards).

¹¹² See, e.g., Taruffo, *supra* note 111, at 672 (observing that the civil law arrangement "can be explained or criticized in several ways, saying for instance that too much discretion is left to courts").

¹¹³ See NANCE, *supra* note 16, at 27-29. As to why the forum court would do this, it is easy enough to fill out the hypothetical by supposing that strict liability is the forum rule in this context, and the forum court considers that to be the better rule. The forum court then might wink at the governing principles of choice of law, which require use of the foreign rule on liability, while effectively applying forum substantive law.

¹¹⁴ In the special case where the only difference between the law of the forum and the

sensitivity to such interdependence that is likely manifested in the Supreme Court's consistent placement of the burden of persuasion on the "substantive" side of substance/procedure lines in choice-of-law analyses. The first Restatement also recognized this—albeit incompletely—in its allowance that persuasion burden rules are sometimes "bound together" with the parties' rights and duties under the jurisdiction's law.¹¹⁵ And the second Restatement identified the explanation for this connection—albeit imprecisely—with its reference to rules the primary purpose of which are "to affect the decision of the issue."¹¹⁶

2. *The Burden of Production*

In stark contrast with the burden of persuasion, the burden of production—which is typically tested before the question of the burden of persuasion can be addressed by the fact-finder—concerns the adequacy of the parties' efforts to provide the fact-finder with information on the basis of which to reach a verdict and the relationship between judge and jury.¹¹⁷ It is focused on the regulation of *the litigation process itself*, to use a commonly invoked phrase. This is not because it has no effect on the result on the merits, nor even because it is not aimed at doing so; but rather, it is because it is intended to accommodate the forum's often competing interests in accuracy, efficiency, and the specification of juridical roles, rather than to adjust the relative prospects of the parties in regard to the merits of the claim.

This formal production burden can be understood as merely one component of a broader sense of the "burden of production." The broader sense also encompasses a great variety of discovery rules (with attendant sanctions), most admissibility rules (such as the hearsay rule and the rule requiring the original of tangible records), adverse inference rules (such as inferences from withholding or destroying evidence), and much more.¹¹⁸ The primary aim of this

law of another state consists in a difference in the burden of persuasion, taking that burden as reflecting preferences of substantive policy means that the non-forum rule should be followed.

¹¹⁵ See *supra* notes 4-9 and accompanying text.

¹¹⁶ See *supra* notes 10-12, 61-66 and accompanying text.

¹¹⁷ See *supra* notes 78-98 and accompanying text.

¹¹⁸ See NANCE, *supra* note 16, at 184-250 (illustrating these points through the concept of the "weight" of evidence).

collection of rules is to place pressure on adversarial litigants to produce such evidence to the fact-finder to achieve an acceptable balance between the goal of maximizing accuracy and the pervasive need to minimize litigation costs. Its contours are not only related to the kind of case involved (for example, civil versus criminal) but also peculiar to the kind of adjudicative system that is being employed, such as an adversarial jury trial.¹¹⁹ Here, the forum state's interest in operating its adjudicative system is compelling. If any aspects of the burden of proof should be governed by forum law, regulations of the burden of production (in this broad sense) are the best candidates.

Nonetheless, confusion arises from the fact that the two burdens are interconnected in two important ways. First, the general standard mentioned above for the narrower sense of the burden of production—whether evidence has been introduced sufficient to allow a reasonable finding in favor of the non-moving party—is incomplete on its face without a specification of the burden of persuasion in the context of which it is assessed. In some contexts, specifically those involving only circumstantial evidence of an ultimate fact, what is sufficient in this sense will depend, for example, on whether the standard of proof is a preponderance of the evidence or clear and convincing evidence. What is sufficient to support proof by a preponderance of the evidence may not be sufficient to support proof by clear and convincing evidence.¹²⁰ This kind of dependence, however, no more renders burden of production rules necessarily about substantive policy than it renders the great bulk of admissibility rules necessarily about substantive policy. After all, in order to apply most admissibility rules, one must know the rules of substantive law that determine the relevance of offered evidence.¹²¹ But no one seriously suggests that this undeniable dependence necessitates the use of all or most non-forum admissibility rules.¹²²

Second, the initial allocation of the burden of production typically (though not inevitably) falls on the party bearing the

¹¹⁹ See *id.*

¹²⁰ See John T. McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382 (1955).

¹²¹ See PARK, ET AL., *supra* note 71, § 5.02.

¹²² Perhaps some might. See *supra* notes 53-54 and accompanying text.

burden of persuasion.¹²³ Some have emphasized that this allocation of the burden of production has outcome-determinative capacity in cases where there is no (or very little) evidence on an element of the cause of action or defense.¹²⁴ If a plaintiff has very little or no evidence on an element of his claim, the burden of production requires a directed verdict (or other summary determination) for the defense. Because of this effect on outcome, it is inferred that the non-forum burden allocation should be applied in a choice-of-law context. The observation is correct, but the inference is not. Suppose in such a case that the matter were submitted to the fact-finder. Given the assumption that a summary determination would have been appropriate, a reasonable fact-finder would still decide against the party bearing the burden of persuasion, here the plaintiff. Ultimately, *that* burden does the work of favoring the defendant. What purposes, then, are served by the summary termination, that is, a ruling that the burden of production has not been satisfied? They are the same purposes already identified: the saving of unnecessary litigation expenses, when the jury verdict is confidently anticipated by the trial judge, and the control of potential jury irrationality. These are neutral procedural considerations that should be resolved pursuant to forum policy.¹²⁵

Moreover, in other evidential contexts the burden of production can be outcome-determinative in the opposite direction, requiring a directed verdict, or partial directed verdict, for the plaintiff.¹²⁶ An example would be a situation where the *defense* has no access to evidence on a particular element of the plaintiff's claim. The point is that any of the unquestionably procedural rules that a forum uses

¹²³ See 2 MCCORMICK ON EVIDENCE, *supra* note 12, § 337.

¹²⁴ See *id.*, § 344 at 734-36 (especially n.47).

¹²⁵ When the trial judge is acting to prevent jury irrationality, the neutral procedural goals are accuracy and the public perception thereof. Although such a ruling in fact favors one side, that is not the point of taking the case from the jury, unless the trial judge is acting improperly. Avoiding the costs associated with the necessity of retrial may counsel in favor of permitting the jury to render its verdict and then granting a judgment *non obstante veredicto*, for if that is reversed on appeal the original jury verdict can be reinstated without the need for retrial. See, e.g., JAMES & HAZARD, *supra* note 86, § 7.22. In any event, all of this is about judicial economy, not favoring a decision for one of the parties. The same can be said for those cases, unlike the one hypothesized above, in which a court summarily terminates the case to encourage one of the parties to present additional available evidence. See *supra* notes 94-98 and accompanying text.

¹²⁶ See JAMES & HAZARD, *supra* note 86, § 7.7.

has such capacity.¹²⁷ It also goes without saying that parties will invoke such rules just when they anticipate being benefited by their application. For example, the operation of the hearsay rule can, given the right arrangement of evidence, require an outcome favoring the plaintiff. But, given the right arrangement of evidence, it can also require an outcome for the defense. That is just part and parcel of having a procedure governed by rules. Neither the hearsay rule nor the burden of production is designed to favor one side or the other, even though the impact in a particular case can, and probably will, favor one side. Instead, both are designed to improve the quantity and quality of the evidence upon which the fact-finder ultimately makes its decision, to avoid the waste of judicial resources, and to avoid irrational jury verdicts and improper trial court control of jury decisions. Once again, this is all well within the range of the procedural goals discussed above. It is no more about favoring one side of the dispute over the other than is the potentially outcome-determinative result of applying a rule imposing a sanction for a party's refusal to comply with pretrial discovery requirements.¹²⁸

Indeed, the default initial pairing of the allocation of the burdens of persuasion and production also generates confusion in judicial opinions and academic commentary with regard to the reasons, conflicts issues aside, that support these initial allocations to one side rather than the other. Some of the factors often noted relate more to one burden than the other, but standard treatments do not tease them apart in this way.¹²⁹ Thus, in explaining the allocation

¹²⁷ See GARNETT, *supra* note 3, at 21-22 (“[P]otentially any procedural rule in a given context may affect the rights and duties of the parties and so alter the result.”).

¹²⁸ The very fact of the default assignment of the initial burden of production to the party bearing the burden of persuasion might seem to be an effort to favor the opposite party. However, the usual initial assignment reflects the fact that the fact-finder will typically start the trial of a case that does not settle at near equipoise between the plaintiff and defendant, in which case the burden of persuasion often would require (in the absence of evidence) a verdict against the party bearing the burden of persuasion, thus making evidence taking unnecessary unless the burdened party moves the odds in its favor. See McNaughton, *supra* note 120, at 1390. This argument illustrates how the initial assignment can be essentially an efficiency rule, not a rule designed to favor one party over the other, even though it depends on a different rule that *is* designed to favor one party over the other. See NANCE, *supra* note 16, at 95-101 (providing further discussion of the fact-finder's starting point at trial).

¹²⁹ See, e.g., Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 8-14 (1959); Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 58-61 (1961). Some of the justifications encountered in judicial opinions

of the burden of persuasion—the risk of non-persuasion—it is certainly important that some claims are disfavored, such as a claim that an opponent has breached a serious social norm.¹³⁰ But the idea that one party should be favored because an opponent is likely to have superior access to relevant evidence is a rationale that speaks specifically to the allocation of the burden of production. Though perhaps less obvious, the same is true for the idea that, when certain ultimate facts are *a priori* likely to be true, the burden should rest on the party claiming those facts are false.¹³¹ It is easy to see, however, how these varying considerations would get jumbled together when the two burdens are initially (and collectively) assigned.

3. Presumptions

Drawing the foregoing distinctions allows one to see the implications for choice of law regarding presumptions. The term “presumption” is used for a great many purposes, and even in the context of proof at trial, historically courts have said things about how presumptions work that are not easy to reconcile.¹³² What

are unhelpful, either because they are tautologies or because they are contentless, such as the argument that the burden of proof on an element should be placed on the party to whose case the element is essential (a tautology) or the argument that the burden of proof should be placed on the party asserting the affirmative of a proposition (usually an empty formalism). See Cleary, *supra*, at 10-11; James, *supra*, at 58-59.

¹³⁰ See generally Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J.L. & PUB. POL’Y 647 (1994).

¹³¹ For example, if a fact is *a priori* likely, given the uncontested facts of the case (or even after some evidence has been presented), then ordinarily the fact-finder will understand that and give the appropriate verdict, without the need to place the burden of persuasion on the party arguing that the fact is false. So in jury trials, ordinarily a modification of the otherwise appropriate allocation of the burden is most likely to be needed, on the basis of such probability, in order to prevent trial judges from taking cases from juries, in the interest of both accuracy and protecting appropriate juridical roles. We thus have a justification of a rule regulating the burden of production, not the burden of persuasion. The same conclusion still follows if the concern is that the jury will not appreciate this *a priori* likeliness, because the judge determines whether the burden of production has been satisfied, whereas the jury determines whether the burden of persuasion has been satisfied. See PARK, ET AL., *supra* note 71, § 2.02. Changing the allocation of the burden of persuasion would have little impact on jury irrationality.

¹³² See generally Edmund M. Morgan, *Presumptions*, 12 WASH. L. REV. & ST. B. J. 255 (1937). Of course, as with burdens of proof more generally, the present thesis concerns presumptions relating to material facts at trial, not presumptions that relate to ancillary matters, such as determining the validity of service of process, subject matter jurisdiction, and the like, which are typically instruments of procedural policy. See GARNETT, *supra*

evidence scholars call “true presumptions” are legal devices that require an inference from certain “foundational” or “basic” facts to a “presumed” fact, where the import of this requirement is a shift of either the burden of production or the burden of persuasion (or both) regarding the presumed fact to a party that did not otherwise bear it.¹³³ Despite intense debate over the years about which burden is appropriately shifted and under what circumstances, there is a considerable degree of consensus today that: (a) a presumption that shifts the burden of production is most justifiable (if it is justifiable at all) when the point of the presumption is merely to recognize the logical or probative force of the inference from the predicate facts (those that give rise to the presumption) to the presumed fact or to address asymmetries in the availability of the evidence to the parties; and (b) a presumption that shifts the burden of persuasion is most justifiable (if it is justifiable at all) when the point of the presumption is to recognize a policy that is sufficiently important as to warrant preferring the party benefited thereby in the event of unresolvable uncertainty.¹³⁴ These points accept the process goals involved in the regulation of the burden of production and the substantive goals involved in the regulation of the burden of persuasion. To the extent that this distinction is followed in practice, and it (or something very much like it) often is,¹³⁵ the argument already presented suggests an obvious resolution to the choice-of-law issue: use presumptions shifting the burden of production specified by forum law; use presumptions shifting the burden of persuasion specified by the chosen non-forum law.¹³⁶

note 3, at 204.

¹³³ See, e.g., PARK ET AL., *supra* note 71, §§ 2.07, 2.08.

¹³⁴ See, e.g., 2 MCCORMICK ON EVIDENCE, *supra* note 12, §§ 342-344.

¹³⁵ See, e.g., CAL. EVID. CODE §§ 603-606; FLA. EVID. CODE §§ 90.302-90.304; HAW. R. EVID. 301-304; R.I. R. EVID. 301-305. Most American states follow a version of Federal Rule of Evidence 301 that specifies, as a default rule, that presumptions shift the burden of production or (depending on the state) that they shift the burden of persuasion. Compare, e.g., MICH. R. EVID. 301 (prescribing default rule that a presumption shifts the burden of production), and N.C.R. EVID. 301 (same), with UTAH R. EVID. 301 (prescribing default rule that a presumption shifts the burden of persuasion), and WIS. STAT. § 903.01 (same). But these are only default rules, subject to alteration by statute. Importantly, therefore, every state chooses (albeit sometimes by default) which kind of presumption to use in each context.

¹³⁶ This was Professor Morgan's position. See Morgan, *supra* note 6, at 192. The same distinction should be applied to so-called *tactical* presumptions, ones as to which the presumed fact is not itself an ultimate fact but is to be used by the fact-finder to infer an

Drawing these distinctions also allows one to avoid familiar paradoxes often associated with the substance/procedure distinction. Suppose, for example, that the non-forum law invokes a presumption that would shift the burden of production, whereas the forum law invokes a presumption in the same context that would shift the burden of persuasion. Under the suggested approach, the non-forum's presumption would not be applied because it is understood as a component of the non-forum state's regulation of procedure, which may not be appropriate in the forum state's procedural system. At the same time, the forum state's presumption is inapplicable because that presumption is taken to be part of the substantive policy of the forum state, with the manifested purpose of favoring the party benefited by the presumption, a policy that, by hypothesis, is not present in the non-forum state's law. The apparent result is that neither presumption applies, whereas some kind of presumption would have applied if all the events and the litigation had occurred in either the forum state or the non-forum state.¹³⁷

The solution to this seeming lacuna in the proposed rules is the recognition that the question whether the forum should invoke a presumption to shift the burden of production is not foreclosed by the indicated characterizations. In particular, because a presumption that shifts the burden of persuasion typically also shifts the burden of production in wholly domestic litigation, the hypothetical presents the occasion for the forum court to consider whether the forum state's management of the production burden should be "detached" from its management of the persuasion burden. In other words, if the procedurally neutral purposes of shifting the burden of production are as important in the instant litigation as they would be in entirely domestic litigation of the same kind in the forum state, as might well be the case, then the production-burden shifting aspect of the forum presumption should

ultimate fact. See Cleary, *supra* note 129, at 25-27. So-called *conclusive* presumptions, ones that cannot be rebutted, are regarded as, in effect, alterations of the substantive law itself. See FELIX & WHITTEN, *supra* note 4, § 65.

¹³⁷ Cf. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 334, cmt. b (A.L.I. 1934) (illustrating a similar paradoxical result in the context of the statute of frauds: "If the statute of frauds of the place of contracting is procedural only and that of the forum goes to substance only, an oral contract will be enforced though it does not conform to either statute.").

be applied even if the persuasion-burden shifting aspect is not.¹³⁸ Thus, such a production-burden-shifting presumption would be employed whether the litigation takes place in the one state or the other. To be sure, there could be differences in how these presumptions would be implemented, as befits their status as components of their respective procedural systems. But the paradoxical element—that *no* presumption is found to apply—can be eliminated.¹³⁹

A similar analysis applies if the forum has *no* presumption on the issue. If a non-forum presumption shifts only the burden of production, the forum ought not automatically apply the non-forum presumption. But neither ought it automatically reject the use of such a presumption. Rather, the forum court will need to ask whether this want of a similar presumption is a considered judgment of procedural policy within the forum. If it is not—as well may be the case, especially when there is no forum cause of action comparable to that of the non-forum state—then the court should consider the question whether a presumption like the one applicable in the non-forum state is consonant with the forum's procedural policy. If so, it should implement such a presumption, assuming that the forum court has the authority to do so.¹⁴⁰

Notice what this means when the forum, in accord with the principles suggested here, chooses to apply a non-forum

¹³⁸ Of course, if the only reason that the forum state would shift the burden of production in litigation involving wholly local events would be to achieve efficiencies associated with matching the allocation of the burden of production to the allocation of the burden of persuasion (*see supra* note 128), then there would be no reason to invoke a detached presumption shifting only the former in the hypothetical case considered in the text. But then there is nothing really paradoxical about the result.

¹³⁹ *Cf. Pilot Life Ins. Co. v. Boone*, 236 F.2d 457, 461-63 (5th Cir. 1956) (applying Alabama choice-of-law principles and rejecting the application of a forum state presumption against suicide that would shift the burden of persuasion to the insurer; holding, however, that the burden of persuasion on the issue of suicide was on the insurer independent of any presumption in accord with both forum and non-forum law; placing the burden of production on the issue on the insurer, either in accord with the non-forum presumption or, more plausibly, as a consequence of the allocation of the persuasion burden).

¹⁴⁰ The court may not have authority. *See, e.g.,* NEB. EVID. R. 301 ("In all cases not otherwise provided for by statute or by such rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence."). Under this and similar state rules, courts have no authority to create presumptions that shift only the burden of production. Whether this would limit courts acting in the choice-of-law context is an open question.

presumption that shifts the burden of persuasion. By the present theory, only that rule's regulation of the burden of persuasion should be applied, not the accompanying regulation of the burden of production that would occur in ordinary litigation in the non-forum state. Instead, the forum court should use (or adapt) any applicable forum rule that would shift the burden of production, or create a permissive inference, or otherwise regulate the burden of producing evidence. In the absence of one, the court should consider whether this case presents the occasion for the introduction of such a production-burden-shifting presumption into forum law, given the incorporation from non-forum law of the rule shifting the burden of persuasion. Again, that is a question of whether such a burden of production rule would complement the procedural system of the forum and is not predetermined by the judgments of the non-forum lawmakers.

V. A Closer Look at the Second Restatement and the Case Law

If the foregoing analysis is correct, one would expect burdens of persuasion to be selected from the non-forum law together with the chosen substantive law, while burdens of production would be supplied by forum law. Similarly, choices regarding true, rebuttable presumptions would depend on whether the effect of the presumption, once triggered, would be to shift the burden of persuasion or the burden of production. In this section, we take a closer look at the second Restatement's provisions regarding burdens of proof, as well as the case law, to see how they square with the foregoing conclusions.

A. *The Second Restatement*

The second Restatement (unlike the first) does provide separate norms for the "burden of proof" (*i.e.*, the burden of persuasion), the "burden of going forward with the evidence," and the "sufficiency of the evidence."¹⁴¹ But the principles stated are rather disappointing:

§ 133 *Burden of Proof*

The forum will apply its own local law in determining which party has the burden of persuading the trier of fact on a particular issue

¹⁴¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 133-135 (A.L.I. 1971).

unless the primary purpose of the relevant rule of the state of the applicable law is to affect decision of the issue rather than to regulate the conduct of the trial. In that event, the rule of the state of the otherwise applicable law will be applied.

§ 134 *Burden of Going Forward with the Evidence; Presumptions*

The forum will apply its own local law in determining which party has the burden of going forward with the evidence on a particular issue unless the primary purpose of the relevant rule of the state of the applicable law is to affect decision of the issue rather than to regulate the conduct of the trial. In that event, the rule of the state of the otherwise applicable law will be applied.

§ 135 *Sufficiency of Evidence*

The local law of the forum determines whether a party has introduced sufficient evidence to warrant a finding in his favor on an issue of fact, except as stated in §§ 133-134.

Obviously, the second Restatement did not produce the clear delineation suggested above. The first two of these sections provide the *same* criterion of choice for both the burden of persuasion and the burden of production, with no systematic difference in application seemingly contemplated. To be sure, § 134 and § 135 at least provide default principles that seem to match the goals served by rules articulating the burden of production.¹⁴² On the other hand, § 133 seems entirely off the mark, at least when addressing the burden of persuasion on the ultimate issues at trial. At a minimum, one would expect a default principle applying the burden of persuasion associated with the otherwise applicable substantive law. The drafters' choice may partially reflect the fact that burdens of persuasion must often be used in connection with the determination of preliminary or ancillary matters—such as the validity of service of process, jurisdiction of the court, admissibility of evidence, or even choice of law—matters that are themselves governed by forum law. On such matters, a preference for forum law regarding proof burdens is both appropriate and uncontroversial.¹⁴³ But, as discussed below, the drafters' choice for a default rule also reflects a split in the case law regarding allocation

¹⁴² Despite the section names, the drafters clarified that presumptions shifting the burden of persuasion are governed by § 133 rather than § 134. *See id.* § 134 cmt. a. Again, this is rather odd in light of the fact that the choice-of-law standards articulated in the two sections are identical.

¹⁴³ *See supra* note 17.

in the context of the burden of persuasion on the ultimate factual issues.

While § 133 clearly addresses the burden of persuasion, a careful reading reveals that it says nothing about the choice of the *standard* of proof. It speaks only to the allocation issue. None of the examples offered by the drafters to illustrate the application of the section even mentions a conflict regarding the standard of proof. One possibility is that the drafters assumed all civil cases are governed by a single standard of proof in all jurisdictions, so no choice on that matter would be necessary. That seems quite unlikely in light of the numerous cases prior to the publication of the Restatement clearly using elevated standards of proof on some issues in some states.¹⁴⁴ Another possibility is that the drafters just assumed that the standard of proof would be taken from the rule of the “state of the otherwise applicable law.” But if they did, it is strange that they did not mention it. It is tempting to think that § 135 itself addresses the standard of proof, especially given its cross-reference to § 133. But again, the drafters’ illustrations for the former all concern the severity of the burden of production, not the severity of the burden of persuasion. So why the cross-reference? Perhaps it was thought necessary because of the principle, well understood when the second Restatement was published, that the severity of the burden of production inherently depends on the burden of persuasion.¹⁴⁵ But even with that understanding, § 133 does not itself speak to choice of the standard of proof.¹⁴⁶

¹⁴⁴ See, e.g., *Jones v. Jones*, 266 S.W. 110, 120-21 (Tenn. 1924) (requiring “clear and convincing” evidence to prove mistake or fraud warranting reformation of written instrument); *In re Will and Estate of Freitag*, 101 N.W.2d 108, 110 (Wis. 1960) (discussing qualifications of rule requiring proof by “clear, satisfactory, and convincing evidence” of the elements of undue influence in order to avoid a will admitted to probate). Such elevated standards of proof in civil cases had also received serious attention by commentators. See, e.g., J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 251-55 (1944).

¹⁴⁵ See *supra* note 120 and accompanying text.

¹⁴⁶ Failure to attend to this issue is not uncommon in the field, even by those who rightly perceive the importance of choosing the burden of persuasion in accord with the otherwise controlling *lex causae*. See, e.g., WILLIAM TETLEY & ROBERT C. WILKINS, *INTERNATIONAL CONFLICT OF LAWS: COMMON, CIVIL, AND MARITIME* 64 (1994) (not attending to standards of proof).

B. The Case Law

1. The Burden of Production

The default initial allocation of the burden of production in accord with the allocation of the burden of persuasion is so common and uncontroversial as to preclude significant conflicts. In theory, a conflict might arise if the burden of persuasion were allocated in accord with non-forum law, and the party thereby burdened were to argue that the burden of production should nonetheless remain on the opposing party in accord with forum law. But no cases have been found addressing such an argument. Similarly, no reported decisions have been identified that would suggest the application of non-forum standards as to when the burden of production is shifted simply as a result of the strength of evidence presented by the initially burdened party. Here, too, no doubt forum law prevails. The significant choice-of-law decisions regarding the allocation of the production burden concern, instead, the applicability of formal presumptions that would shift this burden. This issue is addressed below.¹⁴⁷

There are, however, numerous choice-of-law decisions addressing the severity of the production burden. In this regard, the rule of § 135 is supported by a long and consistent line of decisions—many of which were decided long after choice-of-law doctrine had passed beyond a slavish resort to the traditional substance/procedure distinction—that have chosen forum standards to test the sufficiency of the evidence.¹⁴⁸ The results of these decisions support the theory advanced here, although the language used to explain the results often draws on the familiar criteria

¹⁴⁷ See *infra* Section IV.B.3.

¹⁴⁸ See, e.g., *Tobin v. Pa. R. Co.*, 100 F.2d 435 (D.C. Cir. 1938); *Lobel v. Am. Airlines, Inc.*, 192 F.2d 217, 219-20 (2d Cir. 1951) (applying New York choice-of-law principles); *Ryan v. Adam Scheidt Brewing Co.*, 197 F.2d 614 (3d Cir. 1952) (applying Pennsylvania choice-of-law principles); *Hystro Products, Inc., v. MNP Corp.*, 18 F.3d 1384, 1387-88 (7th Cir. 1994) (applying Wisconsin choice-of-law principles); *Marquis v. St. Louis-S.F. Ry. Co.*, 44 Cal. Rptr. 367 (Cal. Dist. Ct. App. 1965); *Myers v. Gaither*, 232 A.2d 577 (D.C. App. 1967); *Carroll v. MBNA Am. Bank*, 220 P.3d 1080, 1087-88 (Idaho 2009); *Rastede v. Chi., St. P., M. & O. Ry. Co.*, 212 N.W. 751, 754 (Iowa 1927); *Winslow v. Tibbetts*, 162 A. 785 (Me. 1932); *Joffre v. Can. Dry Ginger Ale, Inc.*, 158 A.2d 631 (Md. 1960); *Weir v. N.Y., New Haven & Hartford R.R. Co.*, 162 N.E.2d 793, 797 (Mass. 1959); *Pa. Co. v. McCann*, 42 N.E. 768 (Ohio 1896); *Foley v. Pittsburgh-Des Moines Co.*, 68 A.2d 517 (Pa. 1949); *Healthtronics, Inc. v. Lisa Laser USA, Inc.*, 382 S.W.3d 567 (Tex. App. 2012).

criticized here. In one rather typical case, the court rejected a requested instruction instantiating the non-forum doctrine of *res ipsa loquitur* because that doctrine is a “rule of evidence”—*i.e.*, a rule of the sufficiency of circumstantial evidence—not a rule of “substantive law,” nor one “intended to affect the parties’ substantive rights.”¹⁴⁹ The result is sound even if the reasoning is a bit cloudy.

Another point is worth noting. While federal courts have generally deferred to state law regarding burdens of proof under the vertical choice-of-law principles of *Erie*,¹⁵⁰ there has always been one identifiable point of resistance: standards for sufficiency of the evidence. There are many reported cases where a federal court has expressed the view that federal courts should apply federal standards on the issue of the sufficiency of the evidence to be submitted to a jury, despite the resulting potential for disparate results between state and federal courts and the associated incentives for forum shopping.¹⁵¹ Decisions favoring a federal standard in such cases have explained it in terms reflecting sensitivity to the basis for the horizontal choice-of-law criterion suggested in this Article, emphasizing the need “to preserve ‘the essential character’ of the federal judicial system.”¹⁵² In one decision,¹⁵³ Judge Easterbrook reviewed some of the many differences between federal jury practice and state jury practice, and then commented:

These many distinctions, which must on occasion affect the outcome of litigation, imply that each system of courts should be thoroughgoing in using its own rule to determine which questions go to juries and which to judges—and what is the proper relation between trial and appellate judges. Absorbing bits and pieces of some other procedural system cannot eliminate effects on the

¹⁴⁹ *Walter v. Pizza Hut of Am., Inc.*, No. A-95-184, 1996 WL 442673, at *4-5 (Neb. Ct. App. Aug. 6, 1996) (noting that *res ipsa* was not available under forum law, given the plaintiff’s particular allegations); *see also* *Mohammad v. Toyota Motor Sales, U.S.A., Inc.*, 947 A.2d 598, 602-13 (Md. Ct. Spec. App. 2008) (applying forum law to determine the necessity of expert testimony in determining the existence of a defect).

¹⁵⁰ *See supra* note 39 and accompanying text.

¹⁵¹ *See, e.g.*, *Rotondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992); *Atchison, Topeka and Santa Fe Rwy. Co., Sherwin-Williams Co.*, 963 F.2d 746, 749 (5th Cir. 1992); *Gudgel v. S. Shippers, Inc.*, 387 F.2d 723, 725 (7th Cir. 1967).

¹⁵² *Boeing Co. v. Shipman*, 411 F.2d 365, 369-70 (5th Cir. 1969).

¹⁵³ *Mayer v. Gary Partners and Co., Ltd.*, 29 F.3d 330, 332-35 (7th Cir. 1994).

outcome, but it can cause confusion and uncertainty in a federal system with more than 50 distinct jurisdictions.¹⁵⁴

To be sure, a number of courts have held that state sufficiency standards apply,¹⁵⁵ and the Supreme Court has yet to resolve this split in authority.¹⁵⁶ Which position is better as a matter of federal law is not the present subject, but the fact that rules relating to the sufficiency of the evidence are closely tied to the accommodation of procedural goals within a particular legal system does suggest why many federal courts would be reluctant to incorporate state law on the subject, notwithstanding the policy of *Erie*.

2. *The Burden of Persuasion*

Turning to the subject of the burden of persuasion, it is illuminating to begin with the issue that the second Restatement does *not* address, the matter of choice between different standards of proof. Modern decisions have clearly recognized the connection between the standard of proof and the “substance” of the claim. The most elaborate explanations have come from the courts of Delaware.

In the case of *In re IBP, Inc., Shareholders' Litigation*,¹⁵⁷ the plaintiff sought specific enforcement of a merger agreement, but the defendant claimed breach of warranty and fraud in the inducement.¹⁵⁸ The court held that New York contract law controlled, which presented interesting conflicts regarding standards of proof. First, Delaware law required proof of the elements for specific performance by clear and convincing evidence, while New York law permitted specific performance if proof by a preponderance of the evidence was provided. The court was not faced with an allocation issue, because both Delaware and New York placed the burden of persuasion on the plaintiff to establish the elements of specific performance in question. Moreover, both Delaware and New York law placed the burden of

¹⁵⁴ *Id.* at 333-34.

¹⁵⁵ See, e.g., *Avlon v. Greencha Holding Corp.*, 239 F.2d 616, 618-19 (2d Cir. 1956); *Hamilton v. S. Ry. Co.*, 162 F.2d 884, 896-88 (4th Cir. 1947); *K&T Enter., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 174-78 (6th Cir. 1996).

¹⁵⁶ See *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444-45 (1959); see also *Mercer v. Theroit*, 377 U.S. 152, 156 (1964).

¹⁵⁷ *In re IBP, Inc.*, 789 A.2d 14 (Del. Ch. 2001).

¹⁵⁸ See *id.* at 51-52 (summarizing parties' contentions).

persuasion for both breach of warranty and fraud in the inducement on the defendant, but the standard of proof was (in one respect) conflicting here as well. Delaware's proof standard for the affirmative defense of fraud was a preponderance of the evidence, while New York's was clear and convincing evidence.¹⁵⁹ Thus, the plaintiff would benefit in two ways related to the standard of proof by application of New York law: on the prima facie case for specific performance, New York used the less demanding standard; and on the affirmative defense of fraud, New York used the more demanding standard.

Purporting to apply the principles of the second Restatement, the court noted that its "conflict of law principles by no means provide clear guidance," but "the better reading of them suggests that New York law should apply."¹⁶⁰ In particular, with regard to the prima facie case for specific performance, the court explained:

The question of *which* party has the burden of proof may be seen as purely procedural. But the question of *what* the burden of proof is typically constitutes a policy judgment designed to affect the outcome of the court's decision on the merits. For example, Delaware's choice of the clear and convincing evidence standard appears to have been made for substantive policy reasons that do not affect the trial process. The parties have not provided me with authority suggesting why New York selected the preponderance standard, which is not the prevalent rule in the United States for specific performance. Because the New York approach is the minority approach, I infer that New York public policy as expressed by its common law of long-standing is in favor of a standard that makes it easier, rather than more difficult, to hold a party to its specific promise.¹⁶¹

Similarly, in regard to the affirmative defense of fraudulent inducement, the court chose New York's clear and convincing evidence standard as a manifestation of state policy preferences.¹⁶²

Much of the statement quoted above merely parrots the language of the Restatement. The court does not elaborate on why

¹⁵⁹ See *id.* at 52-54.

¹⁶⁰ *Id.* at 53.

¹⁶¹ *Id.* The first sentence in the quoted passage, while obviously dictum, acknowledges a body of conflicting case law discussed hereafter. See *infra* notes 166-83 and accompanying text.

¹⁶² *In re IBP, Inc.*, 789 A.2d at 54.

Delaware's choice of the clear and convincing evidence standard "appears" to have been made for substantive policy reasons, nor why these reasons "do not affect the trial process." Selection of that standard of proof would certainly affect (and would be intended to affect) jury instructions. But this simply confirms the court's previous observation that the Restatement's criterion is not particularly helpful. Instead, the meat of the court's argument is its statement that the selection of the standard of proof "typically" constitutes a policy judgment, when this is combined with the last quoted comment that New York's policy "makes it easier, rather than more difficult, to hold a party to its specific promise."

Moreover, there is nothing special about standards of proof that are higher (or lower) than the usual preponderance of the evidence standard for civil cases. Even the usual civil standard of proof represents a legal policy about the degree of preference between the litigants' claims when a decision must be made under uncertainty. It just happens to be a policy that expresses a nearly even concern about potential errors favoring each party.¹⁶³ While the Vice Chancellor seemed to suggest that it was the *unusualness* of the non-forum preponderance standard for specific performance—its status as a minority view—that manifested a class preference, such a preference is also present in standards that are the majority rule. The majority status merely indicates that there is agreement about the kind of preference the law should express, not that there is no preference at work. This is illustrated by the court's selection of the non-forum rule requiring clear and convincing evidence of the affirmative defense of fraud, which is certainly a common, if not the majority rule.¹⁶⁴

In this and similar cases, the allocation of the burden of persuasion was not the issue; rather, the severity of the burden so allocated was the issue.¹⁶⁵ The more puzzling aspect of the case law

¹⁶³ It is not perfectly symmetrical, of course, because of the risk of non-persuasion, *i.e.*, someone must win when the fact-finder is in epistemic equipoise. Except in unusual circumstances, the allocation of this risk skews the decision away from a result that would maximize expected accuracy. *See supra* note 75.

¹⁶⁴ *See, e.g.*, 2 MCCORMICK ON EVIDENCE, *supra* note 12, § 340 (describing the common use of the heightened standard of proof for claims of fraud).

¹⁶⁵ *See also* Tyson Foods, Inc. v. Allstate Ins. Co., No. 09C-07-87 MJB, 2011 WL 3926195, at *6 (Del. Sup. Aug. 31, 2011) (rejecting the claim of a conflict, but asserting that if there were a conflict, then the standard of proof required to show the existence and terms of a lost insurance policy would be governed by the otherwise controlling non-forum

is the judicial response to situations where *only* the allocation of the burden was in question, the forum standard of proof being the same as the non-forum standard. These cases have presented a striking split in authority, at least when the standard of proof being allocated is the conventional preponderance of the evidence standard.¹⁶⁶ Many, though not all, involve the question of the burden of persuasion on the issue of contributory negligence in tort cases.¹⁶⁷

law); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, No. 88C-JA-118, 1993 WL 563244, at *3 (Del Sup. Dec. 21, 1993) (choosing the non-forum state's standard of proof on the issue of existence and contents of a lost insurance policy). Ostensibly applying the second Restatement, Texas courts have taken the same approach to standards of proof. *See Arkoma Basin Exploration Company, Inc. v. FMF Associates 1990-A, Ltd.*, 249 S.W.3d 380, 383 (Tex. 2008) (choosing both Virginia's law of fraud and Virginia's standard of proof related thereto, "clear and convincing evidence").

Contrary statements can be found regarding the choice of the standard of proof, but they are decidedly less authoritative. *See, e.g., Boone v. Royal Indemnity Co.*, 460 F.2d 26, 29-30 n.4 (10th Cir. 1972) (stating, in diversity case brought in Colorado federal court on a fire insurance policy as to which Georgia contract law governed, that "[a]bsent a Georgia judicial pronouncement or statutory law tying a certain standard of proof as a matter of policy to the affirmative defense of arson, we hold that the Colorado law [requiring preponderance of the evidence] applies . . . In reality there is no practical difference between the Colorado and Georgia law since the latter requires only a preponderance of the evidence instruction and the burden in both states as to arson is on the insurer . . ."); *Computerized Radiological Servs. v. Syntex Corp.*, 595 F. Supp. 1495, 1503 (E.D.N.Y. 1984) (stating in dicta that forum New York's "clear and convincing evidence" standard would apply to fraud claim rather than California's "preponderance of the evidence" standard, but avoiding a decision about which state's substantive law of fraud applied because no conflict—aside from the differing burdens—was discerned in the requirements thereof, and holding that, in any event, plaintiff had not met either proof standard); *Finch v. Hughes Aircraft Co.*, 469 A.2d 867, 887 (Md. Ct. Spec. App. 1984) (stating that the forum's standard of proof applies as procedural, but citing authorities none of which directly address the standard of proof, and adding that the plaintiffs' would fail in their claim whether the forum or the non-forum standard of proof were applied, making the choice of a standard unnecessary dictum).

¹⁶⁶ If a higher standard were involved, the implausibility of selecting forum law would be too obvious to ignore. We have seen that a choice between a forum preponderance standard imposed on a party and a non-forum heightened standard imposed on the same party will be understood to implicate substantive policy preferences of the non-forum state. How then could a choice between selecting forum law placing a heightened burden on a party and non-forum law placing the same heightened burden *on the opposing party* not be so understood? The latter difference is considerably more dramatic than the former in its allocation of the risk of error.

¹⁶⁷ Cases endorsing the selection of the forum allocation include: *Helton v. Alabama Midland Ry. Co.*, 12 So. 276, 285-86 (Ala. 1893); *Shaps v. Provident Life & Accident Ins. Co.*, 826 So.2d 250, 254 (Fla. 2002); *Babcock v. Chesapeake & Ohio Ry. Co.*, 404 N.E.2d 265, 273 (Ill. App. 1979); *Chicago Terminal Transfer R. Co. v. Vandenberg*, 73 N.E. 990, 996 (Ind. 1905); *Levy v. Steiger*, 124 N.E. 477, 477 (Mass. 1919); *Jenkins v. Minneapolis*

What explains this?

Unfortunately, the published opinions are not very enlightening. They typically use the same distinctions appearing in the Restatements, but these distinctions are of little help, except as convenient explanations of a decision reached on other grounds. The puzzle is to understand why a court would be tempted to ignore the fact that the allocation of the burden of persuasion is a regulation of the trial process that expresses the law's preference for one side of the dispute over the other. Because that allocation determines how the fact-finder is instructed to decide the case when the fact-finder is in equipoise—unable to decide whether the standard specified as part of the burden of persuasion has or has not been satisfied—it expresses an important legal preference for the non-burdened party.¹⁶⁸ The risk thus allocated is no trivial matter to the parties. The cases that do not settle tend to be close cases, and

& St. L. R. Co., 145 N.W. 40, 42 (Minn. 1914) (alternative basis for holding); Wright v. Palmison, 260 N.Y.S. 812 (App. Div. 1932); and Arnold v. Ray Charles Enter., Inc., 141 S.E.2d 14, 18 (N.C. 1965).

Cases endorsing the selection of the non-forum allocation rule include: Southern Ry. Co. v. Robertson, 66 S.E. 535, 536-37 (Ga. App. 1909); Redick v. M.B. Thomas Auto Sales, 273 S.W.2d 228, 232-35 (Mo. 1954); Olson v. Omaha & C.B. St. R. Co., 267 N.W. 246, 248 (Neb. 1936); Precourt v. Driscoll, 157 A. 525, 529 (N.H. 1931); Fitzpatrick v. Int'l Ry., 169 N.E. 112, 115 (N.Y. 1929); Sloniger v. Enterline, 162 A.2d 397, 398 (Pa. 1960); Gordon's Transports, Inc. v. Bailey, 294 S.W.2d 313, 321-24 (Tenn. App. 1956); DeSantis v. Wackenhut, 732 S.W. 2d 29, 33 (Tex. App. 1987); Peterson v. Warren, 143 N.W.2d 560, 567 (Wis. 1966) (dictum). When federal courts are not bound by *Erie* to mirror state court choice of law—in particular, when dealing with federal choice-of-law not arising out of diversity jurisdiction—they have chosen the allocation of the burden of persuasion in accordance with otherwise controlling substantive law. *See, e.g.,* Van Muching [sic] & Co. v. M/V Star Mindanao, No. 82-1092, 1986 WL 6303, at *2 (E.D. Pa. June 4, 1986) (taking the burden of persuasion (as well as the right to an award of attorney's fees) as substantive and thus subject to the parties' contractual choice of law; applying the contractually chosen English admiralty law on the burden of persuasion).

¹⁶⁸ To be sure, an allocation of the risk of non-persuasion to the plaintiff can be explained, at least in part, based on purely efficiency considerations, as a result that avoids the costs of enforcement. *See, e.g.,* Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 12 BYU L. REV. 1, 1-34 (1997) (noting "remedy construction costs, enforcement costs, and transaction costs associated with payment as justifications for the default rule favoring the defendant"). This might seem to support the choice of the forum allocation because litigation efficiency is within the scope of neutral procedural goals. However, in a choice-of-law context, by assumption the contrary allocation has been made by another jurisdiction, whose allocation cannot be so explained, which means that the choice between the two rules cannot be explained entirely on efficiency grounds either. *See* NANCE, *supra* note 16, at 32-36 (discussing the various rationales supporting the allocation and severity of the burden in civil cases, including the efficiency argument).

almost any case that goes to trial can end up a close one on the facts, so advocates fight hard to have the advantage of not bearing that risk.¹⁶⁹ As a consequence, the potential for forum shopping can be quite real.¹⁷⁰

One obvious answer to this puzzle is that some courts have not given careful attention to the issue, relying instead on a traditional substance/procedure distinction to reach a convenient forum-favoring result.¹⁷¹ To be sure, the opposite dynamic is encountered: some of the decisions choosing non-forum allocations encountered a distinct foreign cause of action for which there was no corresponding domestic rule, and in such cases, following the non-forum allocation avoids the inconvenience of a fresh application of forum principles to allocate the burden.¹⁷² In any event, an examination of the opinions in these cases reveals that those applying the non-forum allocation rule are usually more extensively

¹⁶⁹ Disputes on the issue can make it to the Supreme Court. *See, e.g.*, *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 770 (1986) (displacing, on constitutional grounds, the common-law rule for defamation that placed the burden of persuasion on the issue of the truth or falsity of the defamatory statement on the defendant (*i.e.*, to prove truth); placing that burden on the plaintiff (*i.e.*, to prove falsity) when the defendant is in the “media” and the subject matter of the defamatory statement is one of “public concern”). *See generally* KEVIN M. CLERMONT, *STANDARDS OF DECISION IN LAW: PSYCHOLOGICAL AND LOGICAL BASES FOR THE STANDARD OF PROOF, HERE AND ABROAD* 18-23 (2013) (discussing the importance of understanding “equipoise” as covering a range of practically indistinguishable values of epistemic warrant, not just those in which there is a perfect balance of competing evidence, and arguing that the existence of this range is of practical importance in the litigation of disputes).

¹⁷⁰ This is true notwithstanding the fact, emphasized by the drafters of the Restatement, that in many cases neither allocation of the burden of persuasion will defeat the expectations of the parties at the time of the occurrence of the events giving rise to potential liability. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 133 cmt. b (A.L.I. 1971).

¹⁷¹ Arguing that the better view is to choose the non-forum allocation, one court observed that, when a court chose the forum allocation, it was simply “choosing the appropriate classification to enable it to apply its own familiar rule.” *Sampson v. Channell*, 110 F.2d 754, 766 n.2, 756 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940).

¹⁷² The same point holds when the forum and non-forum rules of conduct are similar, but not the same, as when they use different standards for what constitutes contributory negligence. *See, e.g.*, *Palmer v. Hoffman*, 318 U.S. 109, 116-20 (1943) (approving the trial court’s selection, pursuant to New York conflicts law, of the burden of persuasion rule of the non-forum state’s statutory cause of action; refusing, on waiver grounds, to consider a challenge to the trial court’s choice of non-forum law regarding placement of the burden of persuasion on common-law cause of action for negligence).

explained than those applying the forum rule.¹⁷³ Of course, a court's divergence from a perceived traditional rule may have triggered a sense of obligation to provide a fuller explanation, but that nonetheless speaks to the thoughtfulness devoted to the choice.¹⁷⁴

Part of the explanation for selecting the forum allocation on the burden of persuasion might lie in the fact that its allocation typically coincides with the initial allocation of the burden of production.¹⁷⁵ If one thinks that the production burden involves the more important of the functions associated with the allocation, then one might be inclined to think the answer to the choice-of-law question should be driven by the production burden, resulting in a preference for the forum rule. However, tying the initial allocation of the burden of production to that of the burden of persuasion is not a logical or practical necessity. It is merely a default principle adopted because one of the parties must begin the offering of proof and because this default principle has advantages for the efficient administration of trials.¹⁷⁶ If the forum court does not think that the coinciding allocation of the two burdens makes sense, the forum court can alter that result, even though it incorporates the burden of persuasion of the non-forum court. There is no good reason that the allocation of the persuasion burden must be determined by the allocation of the production burden.

Suppose the jurisdiction of a Continental court is invoked, one that does not permit the parties to control the presentation of the evidence, and therefore does not even recognize a burden of production (at least not in any sense like that in adversarial proceedings).¹⁷⁷ And suppose this forum court selects the tort or

¹⁷³ Some of the problems with the opinions endorsing the choice of the forum rule have been mentioned earlier. *See supra* notes 20-33 and accompanying text. Some of these opinions do not give serious attention to the issue, but rather pass by it with the attribution of a quick label as either substantive or procedural. *See, e.g.,* *Arnold v. Ray Charles Enter., Inc.*, 141 S.E.2d 14, 18 (N.C. 1965) (applying the forum North Carolina rule regarding placement of the burden of proving facts regarding an absolving condition in a contract, but providing only a one-paragraph treatment that fails even to identify any conflict that needs to be resolved between forum law, on the one hand, and either the law of the place of contracting, New York, or the law of the place of performance, Virginia).

¹⁷⁴ *See, e.g.,* *Redick v. M.B. Thomas Auto Sales*, 273 S.W.2d 228, 232-34 (Mo. 1954) (overruling earlier Missouri law and choosing the non-forum allocation).

¹⁷⁵ *See supra* notes 123-25 and accompanying text.

¹⁷⁶ *See supra* note 128.

¹⁷⁷ *See supra* note 80 and accompanying text.

contract law of an Anglo-American jurisdiction as controlling. The forum court should, and probably would, incorporate the non-forum state's burden of persuasion, both in terms of its allocation and its severity, but, the court would simply ignore the allocation and severity of the burden of production that the Anglo-American jurisdiction would recognize for such a case.¹⁷⁸ Conversely, an American forum should follow a civil-law rule on the burden of persuasion for a cause of action governed by the corresponding European substantive law, provided such a proof rule can be identified.¹⁷⁹ Arguably, this makes sense even when the civil-law rule allows the fact-finder considerable discretion in setting the effective standard of proof.¹⁸⁰ Again, this need not correspond with the court's allocation of the burden of production.

Interestingly, among courts that have chosen forum law on the allocation of the burden of persuasion, no case has been identified in which the court also faced a substantial difference in the standard of proof. If they had, the choice of forum law would have been much less plausible. As we have seen, courts rightly perceive a difference in the standard of proof as an expression of the law's preference between classes of litigants.¹⁸¹ What if this were coupled with an allocation difference? Suppose that forum law places the burden of proving X (say, someone's negligent conduct) on the plaintiff under the usual preponderance of the evidence standard, while the non-forum law in question places the burden of proving not-X (*i.e.*, the exercise of due care) on the defendant according to the clear and convincing evidence standard. If one were serious about choosing forum law on the allocation issue but non-forum law on the standard issue, how would a court respond? The most plausible way would be to say that it is the plaintiff's burden to show that there is *not* clear and convincing evidence of the person's due care.¹⁸² Faced with such a jarring prospect, a court would almost

¹⁷⁸ See, e.g., Maximilian Seibl, *Burden of Proof*, in 1 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 236, 237-39 (2017) (reviewing the conflict-of-laws literature with a focus on European law).

¹⁷⁹ See *supra* notes 111-112 and accompanying text.

¹⁸⁰ Cf., *Johnson v. Knight*, 459 F. Supp. 962, 967-68 (N.D. Miss. 1978) (applying Mississippi conflicts principles to select Alabama negligence and breach of warranty claims together with Alabama's proof standard requiring "belief in the fact to the reasonable satisfaction" of the fact-finder).

¹⁸¹ See *supra* note 157-65 and accompanying text.

¹⁸² The other conceivable construction, that the plaintiff bears the burden to show the

certainly match the choice of the allocation of the burden to that regarding the standard, that is, to have both governed by non-forum law.¹⁸³

In the absence of a better justification for the decisions that have chosen the forum state's allocation, the conclusion to be drawn from these considerations is that the burden of persuasion, in both its allocation and its severity (the standard of proof), should be governed by the pertinent non-forum state rule.¹⁸⁴

3. Presumptions

According to the theory presented here, when the non-forum state presumption would shift the burden of persuasion, it should be applied, while such a forum state presumption shifting the burden of persuasion should not. In fact, the cases generally so hold.¹⁸⁵ On

person's negligence by clear and convincing evidence, would place a significantly higher burden on the plaintiff than would be true for events occurring entirely in either state. No plausible justification for such a result comes to mind.

¹⁸³ This has been the result in the vertical choice-of-law context. *See, e.g.*, *Garrett v. Moore-McCormick*, 317 U.S. 239, 249 (1942) (holding that a state court adjudicating a federal admiralty claim must use the federal rules on both allocation and severity of the burden of persuasion regarding the validity of a release signed by the plaintiff).

¹⁸⁴ Modern conflicts theory generally accepts the occasional *dépeçage*—using only some portions of non-forum substantive law and not others (or even rules from different non-forum states on different issues) if good reason exists for doing so. Yet courts and commentators, whether working in the context of traditional approaches, like that of the first Restatement, or in the context of more modern approaches, like that of the second Restatement, often find it difficult to see how one can justify severing the connection between a substantive element and the burden of persuasion associated with it in the selected law. *See* FELIX & WHITTEN, *supra* note 4, §§ 69, 70.

¹⁸⁵ *See, e.g.*, *Pilot Life Ins. Co. v. Boone*, 236 F.2d 457, 462 (5th Cir. 1956) (applying Alabama choice-of-law principles; rejecting the application of a forum presumption against suicide that would shift the burden of persuasion, but holding that the burden of persuasion on the issue of suicide was on the insurer independent of any presumption in accordance with both forum and non-forum law); *Kabo v. Summa Corp.*, 523 F. Supp. 1326, 1331 (E.D. Pa. 1981) (applying Pennsylvania choice-of-law principles and tying the allocation of the persuasion burden to the choice between Nevada's and Pennsylvania's Innkeeper Statutes); *Pittsburg, C., C. & St. L. Ry v. Grom*, 133 S.W. 977, 980-81 (Ky. 1911) (applying non-forum state's presumption of negligence that placed on defendant railroad the burden to prove that plaintiff's injury was not the result of defendant's negligence); *Buhler v. Maddison*, 176 P.2d 118, 123 (Utah 1947) (applying non-forum state's rule regarding the effect of a presumption of negligence, emphasizing that the presumption shifts the burden of persuasion to the defendant); *see also* *Otal Inv. Ltd. v. M/V Clary*, 494 F.3d 40, 50 (2d Cir. 2007) (applying federal choice-of-law principles and holding that a maritime presumption of the forum shifting the burden of persuasion is substantive and thus abolished by the applicable international convention regarding

the other hand, when the forum presumption would shift only the burden of production, it should be applied, whereas a non-forum presumption of this kind should not. Again, this is the usual result in the cases.¹⁸⁶

To be sure, considerable confusion attends the use of presumptions. Often the term “presumption” is used in a manner that does *not* refer to a rule that shifts the burden of production or the burden of persuasion from one party to an opponent upon the former’s proof of specified foundational facts.¹⁸⁷ In the present context, the most important confusion arises because a court may use the term simply to explain the *initial* allocation of the burden of persuasion. Examples can be seen where a court says there is a

collisions at sea). *But see* Helton v. Alabama Midland Ry. Co., 12 So. 276, 285 (Ala. 1893) (declining to apply non-forum presumption shifting the burden of persuasion; St. Louis & S.F. R. Co. v. Coy, 168 S.W. 1106, 1110-12 (Ark. 1914) (seemingly applying forum presumption shifting burden of persuasion). Of course, such early cases tend to be affected by simplistic criteria of what is procedural for choice-of-law purposes.

¹⁸⁶ See, e.g., Sylvania Elec. Prods. v. Barker, 228 F.2d 842, 848-50 (1st Cir. 1956) (applying Massachusetts choice-of-law principles; using forum state presumption of a manufacturer’s knowledge of dangerous quality of product, noting that the presumption shifts the burden of production, not the burden of persuasion, and therefore governs the determination of the sufficiency of the evidence to go to the jury); Md. Casualty Co. v. Williams, 377 F.2d 389, 393 (5th Cir. 1967) (applying Mississippi choice-of-law principles; rejecting application of non-forum presumptions that would shift only the burden of production); Weber v. Continental Cas. Co., 379 F.2d 729, 732 (10th Cir. 1967) (applying Oklahoma choice-of-law principles; rejecting application of a non-forum presumption in part because it did not shift the burden of persuasion); Marquis v. St. Louis-San Francisco Ry. Co., 44 Cal. Rptr. 367, 369-70 (Cal. Dist. Ct. App. 1965) (rejecting application of non-forum presumption that would shift burden of producing evidence); Boersma v. Amoco Oil Co., 658 N.E.2d 1173, 1180-81 (Ill. App. 1995) (rejecting application of non-forum Indiana *res ipsa loquitur* rule because it entailed a rebuttable presumption that would shift only the burden of production); Richardson v. Pacific Power & Light Co., 118 P.2d 985, 996-97 (Wash. 1941) (discussing appropriate application of forum state presumption of due care that shifts only burden of producing evidence, noting that jury instruction erroneously suggested that burden of persuasion was shifted as well); see also Ishizaki Kisen Co., Ltd. v. United States, 510 F.2d 875, 880 (9th Cir. 1975) (applying second Restatement in admiralty case; holding that a presumption shifting the burden of persuasion was substantive and inapplicable under controlling non-forum law, and specifically stating, “Were the [presumption] designed merely to shift to the violator of the statutory rule the burden of going forward with the evidence its characterization as ‘procedural’ would be proper.”).

¹⁸⁷ For example, courts sometimes use the term to describe legal devices that, upon closer inspection, involve mere permissive inferences. See, e.g., *In re Estate of McGowan*, 250 N.W.2d 234, 239 (Neb. 1977) (interpreting earlier rulings described in terms of presumptions (of undue influence) as really only involving permissive inferences).

“presumption against fraud,” as part of the explanation that the defense bears the burden of proving plaintiff’s fraud in order to avoid a contractual duty; or saying that there is a “presumption of innocence,” as part of charging the jury that the burden of proving arson that would vitiate the insurer’s duty under a fire insurance policy rests upon the defense.¹⁸⁸ Suffice it to say that a lack of sensitivity to such phenomena can lead to confused decisions on choice of law.¹⁸⁹ From a choice-of-law perspective, it should make no difference whether or not the jurisdiction supplying the substantive rule of decision uses something *called* a presumption to achieve its goals. What matters is the effect given to such presumptions.¹⁹⁰

Consider a 2006 federal interpleader case arising under ERISA, *DaimlerChrysler Corporation Healthcare Benefits Plan v. Durden*.¹⁹¹ The issue was which of two women claiming to have been married to a deceased employee of DaimlerChrysler would receive “surviving spouse” benefits.¹⁹² The determinative factual issue was whether the first marriage was ever dissolved before the second marriage was undertaken, a matter on which the evidence was unclear.¹⁹³ Long-established principles of interpleader were unhelpful in placing the initial burden of persuasion on one of the two claimants.¹⁹⁴ In any event, the court did not even discuss an

¹⁸⁸ See, e.g., *Life Ins. Co. of Va. v. Hairston*, 62 S.E. 1057, 1066 (Va. 1908) (using the language of a “presumption of innocence” to assign the intermediate “clear and satisfactory proof” burden of persuasion to the insurer to prove exclusions from coverage involving alleged acts of moral turpitude by the insured).

¹⁸⁹ See, e.g., *Neve v. Reliance Ins. Co. of Phila.*, 357 S.W.2d 247, 250 (Mo. Ct. App. 1962) (rejecting a foreign allocation of the burden of persuasion that is explained in terms of a presumption on the ground that presumptions in the forum only shift the burden of production).

¹⁹⁰ See, e.g., *Hiatt v. St. Louis-S.F. Ry. Co.*, 271 S.W. 806, 812-13 (Mo. 1925) (applying the non-forum state’s rule regarding the effect of a presumption of negligence that determines the burden of persuasion; explaining the result as an initial allocation of the burden of persuasion).

¹⁹¹ 448 F.3d 918 (6th Cir. 2006).

¹⁹² *Id.* at 920-21.

¹⁹³ *Id.*

¹⁹⁴ For example, according to one line of authority, “each claimant has the burden of establishing the right to the fund or property by a preponderance of the evidence.” 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1714 at 629 (3d ed. 2001). That principle is unhelpful in the extreme, at least in this context, because the point of the allocation aspect of the burden of persuasion was to place the risk of non-persuasion on one of the claimants, and the

initial allocation of the burden of persuasion apart from the matter of competing presumptions. Instead, it used these presumptions to directly allocate the burden of persuasion and to specify its severity.

Because federal law defers to state law regarding the question of who is the surviving spouse, the court was required to address the question of which state law to follow.¹⁹⁵ On the one hand, Michigan's presumption of the validity of the later marriage placed the burden of persuasion on the first wife to show by "clear and positive proof" that the first marriage had not been dissolved.¹⁹⁶ Alternatively, Ohio's presumption of the continuing validity of a prior marriage placed the burden of persuasion on the second wife to show by "concrete proof" that the first marriage had been dissolved.¹⁹⁷ In this non-*Erie* context, the federal court followed the second Restatement in resolving that question.¹⁹⁸ It recognized the Restatement's general rule that the validity of a marriage is determined by the law of the state with "the most significant relationship to the spouses and the marriage," and the court determined that to be Ohio, because of the marital domiciles.¹⁹⁹ It also examined whether this choice was overridden by the benefits plan's contractual choice of Michigan law.²⁰⁰ It concluded it was not, because the two state presumptions represented fundamental but incompatible policy preferences about which spouse should win in the context of unresolved doubt about the dissolution of the first marriage.²⁰¹ In the interest of uniformity, the dissenting judge would have allowed the contractual choice of law to prevail for all employees, regardless of domicile.²⁰²

Significantly, neither the majority nor the dissent—nor, for that matter the second wife—argued that these state law presumptions

suggested standard would place that risk on *both* claimants, with the result that the fund or property could not be awarded to either claimant if the court remained unconvinced by the evidence, even when there was no doubt that one of the claimants is entitled to the property.

¹⁹⁵ See 448 F.3d at 922.

¹⁹⁶ *Id.* at 925-26.

¹⁹⁷ *Id.* at 926.

¹⁹⁸ See *id.* at 922-23.

¹⁹⁹ *Id.* at 924-25 (relying on RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (A.L.I. 1971)).

²⁰⁰ *Id.* at 923-27 (applying RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187).

²⁰¹ *Daimler*, 448 F.3d at 925-27.

²⁰² *Id.* at 928-29.

were procedural only and thus inapplicable in federal court. And neither opinion discusses the comment by the drafters of the second Restatement, which (unsurprisingly) distinguished between two categories of presumptions—those that should follow forum law because they “are concerned primarily with judicial administration,” and those that should follow the non-forum law because their “primary purpose is to affect the decision of the issue”—and then placed the kind of marital presumptions involved in *Durden* in the former category:

[One] category comprises rules that are concerned primarily with judicial administration. Such rules may be designed to facilitate a finding in accordance with the balance of probability. Examples are rules which provide that a ceremonial marriage shall be presumed to be valid and that a marital status shall be presumed to continue When rules of this sort are involved, the forum will apply its own local law [T]here is no reason why the forum should assume in such instances the burden that would be involved in ascertaining and then in applying the relevant rules of the state of the otherwise applicable law.²⁰³

Striking here is the capacity of authorities to be in stark disagreement about the rationale of particular presumptions when considered apart from their practical impact on burdens at trial, which manifestly did not control the Restatement drafters' categorization.²⁰⁴ And the obvious antidote for this uncertainty is focusing on that practical impact. The court in *Durden* apparently did so, as it did not infer from the language quoted above that the presumptions at issue were “concerned primarily with judicial administration.” Instead, the court implicitly adhered to a practical

²⁰³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 134 cmt. b (A.L.I. 1971).

²⁰⁴ One might argue that the drafters' comments are inapposite to the situation in *Durden*, because the drafters here considered only presumptions that regulate the production burden. But the logic of the Restatement is ostensibly driven by its purpose, not its impact. Whether a presumption shifts the burden of persuasion or the burden of production, the Restatement's test looks to whether the primary purpose is to regulate the conduct of the trial or to affect the decision of the issue. *See id.* cmt. a (stating that presumptions shifting the burden of persuasion are governed by § 133, which articulates the same criterion of choice). And the drafters placed the kind of marital presumptions involved in *Durden* in the category of presumptions the primary purpose of which are to regulate the conduct of the trial. If, despite appearances, the drafters' categorization would have been different had they considered marital presumptions that affected the burden of persuasion, as in *Durden*, then to that extent the Restatement would endorse, *sub silentio*, the approach suggested in this Article.

test: a regulation of the burden of persuasion—a specification of its allocation or its severity—should be taken together with the elements of the chosen substantive law to which it relates.

VI. The Complications of Purposive Mismatch

A. Purposes and Functions

The discussion thus far does not fully account for the possibility of a mismatch between the purpose of the non-forum proof rule and the function that the rule serves. To be sure, sometimes a potential mismatch can be avoided. In many situations, there may be little or no history for the rule that clearly identifies its original purpose. When a court faces such a choice-of-law problem, it is entirely reasonable to assume that the current function of the rule was (or now is) the intended one. The same conclusion is plausible when the express purpose does not match the function, but the expression of the purpose by the rule's promulgator is very old, subject to a purposive desuetude. That is, whatever the original purpose of the rule, if its function is different, over time one would expect that this mismatch would be discovered and corrected. If the function remains unchanged, then it is fair to conclude that the purpose of the rule has evolved to coincide with its function.

But this sort of avoidance strategy will not always be possible. Sometimes, the recently stated (or reaffirmed) purpose of a non-forum rule will not match its function. In that case, what is the forum court to do? In light of the foregoing discussion, two conspicuous situations might arise in the burden of proof context. First, a burden of proof rule in the non-forum state may be explicitly articulated as designed to serve neutral procedural goals, but the rule implemented may actually function to favor one class of litigants over another. Suppose, for example, that the non-forum state has promulgated a rule placing the burden of persuasion regarding the defendant's negligence on the defendant, perhaps by way of the operation of a presumption. It has explained this allocation by virtue of the plausibility of the inference endorsed by the presumption and defendant's superior access to evidence regarding the defendant's negligence, thus suggesting the goal of improving accuracy by avoiding premature termination of the case and providing an appropriate incentive to produce evidence. The "legislative" history (whether the rule originates from a legislature or a court) says nothing about (or even denies) favoring plaintiffs as

a class by use of the rule.²⁰⁵ Should the forum court honor this statement of purpose by characterizing the rule as merely procedural, or should it recognize the function of the announced rule in favoring a particular class of plaintiffs?

Second, a proof rule in the non-forum state may be explicitly articulated to purposely favor one class of litigants over another, but the rule announced may actually serve only to make adjudication more (or less) efficient, more (or less) accurate, or otherwise promote (or undermine) procedural goals. Suppose that the non-forum state employs a presumption against suicide that shifts the burden of production on the issue of suicide, but not the burden of persuasion, to the defendant insurance company. And suppose that the rule is ostensibly justified in terms of a policy to protect the insured's good name and the family of the insured individual from economic distress.²⁰⁶ Should the forum court honor this statement of purpose by declaring the rule a part of, or to be taken together with, the non-forum state's substantive law, even if the function of the presumption does not discernibly protect the insured's good name or the economic stability of the family of the insured? Or should it instead recognize the function of the announced rule and its reliance on the inherent unlikelihood of suicide as an explanation of death in providing a logical basis for the fact-finder's inference against suicide?

Such mismatches can occur for many reasons, ranging from the rule-maker's laziness or ineptitude to calculated deceit. Rule-makers might pick what seems to be a useful doctrinal vehicle for addressing a problem, without giving careful attention to

²⁰⁵ *Cf. S. Ry. Co. v. Robertson*, 66 S.E. 535, 537 (Ga. Ct. App. 1909) (discussing the possible application of a forum statutory presumption shifting the burden of persuasion in a context where non-forum substantive law was applied; characterizing the presumption as procedural after explaining the presumption in terms that would warrant only a shift in the burden of production). Interestingly enough, Georgia's statutory scheme was subsequently declared unconstitutional. *See W. & Atl. R.R. v. Henderson*, 279 U.S. 639 (1929), whereas a similar rule that would shift only the burden of production had survived constitutional scrutiny. *See Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35 (1910); Nance, *supra* note 130, at 672-82.

²⁰⁶ *Cf. Republic Nat'l. Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 559 (Tex. 1976) (relying on presumption of innocence of criminal conduct to justify presumption that shifts burden of *production* to insurer to present evidence showing that insured engaged in felonious acts resulting in the insured loss). Interestingly, this rule was later replaced by a statute that put the burden of *persuasion* on the insurer to prove the felonious act of the insured. *See infra* note 220.

alternatives that are better tailored and introduce less confusion. A rule-maker, especially a legislature, that makes a political decision to favor a class of litigants by adopting a particular proof rule might nonetheless want to hide its intentions by claiming that the effort is merely to make trials more accurate or efficient. Alternatively, if a legislature wants *not* to favor a certain class of litigants, but for political purposes wants to make a public display as if it does, the legislature might want to hide the actual intentions by adopting a proof rule that modestly affects the accuracy or the cost of litigation. What is the forum court to do with such situations?

Many of the most difficult problems of modern choice-of-law methods, which are all based on some form of governmental interest analysis, arise from the fact that they require the court to ascertain the purpose or rationale of the rule the court is considering.²⁰⁷ The conventional, modern answer to the kind of questions posed above is that the forum court should take those governmental interests into account.²⁰⁸ That may be correct as a general proposition, but the difficulties in doing so are often considerable. Identifying a rule's "primary" purpose is not always easy, even when the lawmaker is not trying to conceal it. There can be several equally important purposes, and there is often a difference between the lawmaker's purpose in positing a rule and the interpreted purpose of the rule itself. That is at least partially due to the fact that the purpose of a rule for adjudicatory purposes is something "constructed" from legal materials, not just observed or found.²⁰⁹ Moreover, that construction may take the interests of the state that promulgates the rule into account, even if those interests are not contemplated by the rule's promulgators; indeed, the promulgators may not have had any such contemplation at all.²¹⁰ To be clear, when the courts of a state

²⁰⁷ See FELIX & WHITTEN, *supra* note 4, § 56.

²⁰⁸ See, e.g., *id.* § 65.

²⁰⁹ This has been a familiar theme of legal theory for generations. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1374-80 (1994) (prepared for publication from 10th ed. 1958) (summarizing norms for *attributing* a purpose to a statutory rule, and rejecting the search for legislative "intent" as an historical fact). See *generally* RONALD DWORKIN, *LAW'S EMPIRE* (1986) (developing sophisticated theory of interpreting legal materials that does not depend solely on an historical inquiry into the intent of the promulgators of materials being interpreted).

²¹⁰ For discussion of the difficulties in determining governmental interests in the choice-of-law context, see FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE*

are engaged in the interpretation of *that* state's rules, there may be no acceptable alternative to such purposive inquiries and constructions. But the situation can be different in the choice-of-law context. The forum court may then choose not to focus on the purposes declared by the non-forum rule-makers, nor to focus on the purposes articulated by the non-forum courts in their interpretation of those rules, but rather to concentrate attention on the way the latter actually implement the rule in the non-forum courts.²¹¹

At least in the burden of proof context, this approach has several benefits. The most obvious is relative simplicity for the forum court. It need not struggle with the available legal materials from a foreign jurisdiction for clues to an asserted, implicit, or undisclosed purpose at variance with the actual function of the proof rule. It need not engage the jurisprudential difficulties of constructing legislative intent or purpose.²¹² It need only determine whether the non-forum state courts use the rule to fix the burden of persuasion—to allocate it or to specify the degree of its severity. Other aspects of the foreign burden of proof rules can be safely ignored.²¹³

Simplicity is coupled with improved accuracy in the

JUSTICE 131-39 (1993).

²¹¹ Cf. Ernest G. Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311 (1923) (analyzing the various functions actually served by statutes of frauds and arguing that choice-of-law rules should take such statutes as limiting substantive rights in a way that is recognized together with other aspects of the selected *lex loci*, despite diversity in the wording of state statutes and in how the state courts characterized the purpose of such statutes for entirely domestic litigation); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 141 (A.L.I. 1971) (specifying that the law otherwise governing the validity and enforceability of the contract determines “[w]hether a contract must be in writing, or evidenced by a writing, in order to be enforceable”).

²¹² Similar considerations influenced the Supreme Court's decision to take a seemingly bright-line approach to the interpretation of the Rules Enabling Act limitation that bars promulgation of federal rules of practice and procedure that would alter “any substantive right,” including a state-created right invoked in a diversity case. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S.Ct. 1431 (2010) (rejecting, as a limitation on a federal class action, a state procedural rule suggested to have the real purpose of modifying state substantive remedies). The plurality opinion rejected an inquiry into the state legislative purpose as “an enterprise destined to produce ‘confusion worse confounded.’” *Id.* at 1440-41 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

²¹³ One obvious exception would arise if a relatively new foreign rule had not yet been applied by that state's courts. In such a case, the forum would have no option but to try to anticipate how it would be applied by the non-forum courts, and this might force the forum to entertain the interpretive difficulties noted.

identification of non-forum policy, at least if one accepts a modestly cynical realism: the function of the non-forum rule is at least as likely to reflect its actual purpose as are comments made by way of justification of it.²¹⁴ And when purposive mismatch is merely the result of ineptitude, using this approach provides additional feedback—from jurisdictions other than the one announcing the proof rule—as a result of which poorly crafted rules may be improved. In fact, the approach puts some pressure, however small, on rule-makers to promulgate rules that match their real purpose. To do otherwise risks its rule being ignored by any other state that would use the choice-of-law principle here suggested, namely: attend to the actual function, not the declared (or inferred) purpose. Indeed, the more that states follow the suggested principle, the greater that pressure would be. It constitutes a small “truth in advertising” measure.²¹⁵

This last point implicates a broader consideration. Among the important choice-influencing considerations consistently noted is the idea of protecting legitimate expectations.²¹⁶ While this idea usually relates to the expectations of the potential litigants,²¹⁷ it is also possible to think in terms of the expectations of the states themselves.²¹⁸ This can be facilitated by allowing jurisdictions, within limits, to make their own choice about whether their rules should be considered part of their substantive law for choice-of-law

²¹⁴ The Supreme Court has taken a similarly pragmatic approach in assessing the constitutionality of presumptions against the accused in criminal cases. Rather than encouraging lower courts to focus on the supposed purpose of the presumption, which may be identified (or invented) by prosecutors only in the course of the appeal, the Court insists that lower courts focus on exactly how the presumption actually operates at trial—on how, in particular, the jury is instructed. *See* PARK ET AL., *supra* note 71, § 2.12.

²¹⁵ *Cf.* Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103 (2011) (arguing that, in the vertical choice-of-law context, one reason to reject incorporation of state procedural rules in conflict with the Federal Rules is to discourage states from using procedural rules to dilute, *sub rosa*, substantive rights that they themselves have created).

²¹⁶ *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(d) (A.L.I. 1971).

²¹⁷ *See id.* § 6(2)(d) cmt. g.

²¹⁸ *See id.* § 6(2)(a) (referring to “the needs of interstate and international systems”). *See generally* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 145-89 (1991). Professor Brilmayer assumed that states have little interest in seeing their procedural norms respected by other states where litigation may arise and did not contemplate specifically the potential coordination among states regarding burdens of proof. *See id.* at 171.

decisions made in other states.²¹⁹ In this context, this is achieved by requiring the former to choose a rule the function of which matches the purpose it purports to serve. In other words, if a forum-court adopts the choice-of-law principles suggested above—dividing proof rules according to whether they regulate the burden of persuasion or the burden of production—then each *other* jurisdiction has a choice when promulgating or interpreting its own proof rules about how it wants that forum jurisdiction to perceive its rule. If other jurisdictions want the forum court to enforce their rule, they need only make it a rule that fixes the burden of persuasion, by allocating it to one side or the other or by specifying the standard of proof the fact-finder is to use.²²⁰ If, instead, the jurisdiction's policy-makers cannot justify the employment of such tools to themselves, then they should not be surprised when another state, acting as the forum, does not apply the rule in question.

These advantages can be illustrated by reviewing a decision with unusually extensive discussions of choice of law regarding presumptions. In *Melville v. American Home Assur. Co.*,²²¹ then federal district judge Edward Becker had to select the controlling law for a dispute over a life insurance policy purchased in Delaware by a Delaware resident, but issued in New York by a New York insurance company. The defendant denied coverage on the ground of suicide.²²² The suit was filed in federal district court in Pennsylvania, where the beneficiary resided, invoking federal jurisdiction based on diversity of citizenship.²²³ Applying Pennsylvania choice-of-law principles, which were then in flux,

²¹⁹ The phrase "within limits" emphasizes that a state ought not be able to manipulate other states into using its procedural rules by the mere expedient of *declaring* them to be substantive. Even the non-forum state's good faith characterization of its own rules as substantive or procedural is not controlling for the forum state's choice-of-law decision. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 7, 584 (A.L.I. 1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7(2). The non-forum state must *do* something that will be recognized by the forum state as manifesting the non-forum state's substantive policy.

²²⁰ Lawmakers can and do respond to perceived inadequacies in proof allocations. See, e.g., *Nobles v. Emps. Ret. Sys. of Tex.*, 53 S.W.3d 483, 486-89 (Tex. App. 2001) (discussing statutory change placing burdens of proof on insurer regarding exclusion from life insurance coverage for death occurring while the insured is engaged in felonious activity).

²²¹ 443 F. Supp. 1064 (E.D. Pa. 1977), *rev'd*, 584 F.2d 1306 (3d Cir. 1978).

²²² See 443 F. Supp. at 1068-76.

²²³ *Id.* at 1076.

Judge Becker chose New York contract law as controlling.²²⁴ He then had to select which state's rule regarding a "presumption against suicide" to employ—New York's "strong" presumption that, upon proof of death otherwise within the policy, shifted the burden of persuasion to the insurer to prove death by suicide, or Pennsylvania's rule that it is permissible to infer, based on common understanding of human nature, that death was not self-inflicted.²²⁵ Judge Becker, in a carefully reasoned opinion, chose the New York presumption, applicable in the forum because it reflected New York's substantive policy.²²⁶ Interestingly, he reached this characterization despite the fact that New York courts had explained the presumption in terms that would seem to warrant only a permissive inference or, at most, a shift of the burden of production.²²⁷ For Judge Becker, apparently controlling was the fact, clearly established in New York law, that this presumption shifted the burden of persuasion to the insurer.²²⁸

The court of appeals reversed, holding that Delaware's substantive contract law controlled under Pennsylvania's choice-of-law approach.²²⁹ It then reasoned as follows: Pennsylvania courts would consider "the presumption against suicide" to be an instrument of substantive policy—apparently, regardless of what kind of presumption is involved or how it operates in the legal system of the state from which it is derived. Therefore, Delaware's permissive inference rule applies in the Pennsylvania forum. The court gave no justification for its rather bizarre premise concerning the presumption against suicide. It relied on the second

²²⁴ *Id.* at 1097-1107.

²²⁵ *Id.* at 1076-82.

²²⁶ *Id.* at 1107.

²²⁷ *See id.* at 1082 ("New York's presumption against suicide is based on 'the truth drawn from general human experience, that death by suicide is an improbability, that most men cling to life'," quoting *Wellisch v. John Hancock Mut. Life Ins. Co.*, 56 N.W.2d 540 (N.Y. 1944)); *see supra* note 134 and accompanying text.

²²⁸ *See Melville v. Am. Home Assurance Co.*, 443 F. Supp. 1064, 1082 (E.D. Pa. 1977):

The Pennsylvania presumption would only have aided plaintiff in meeting her initial burden of producing evidence. This was accomplished in our trial without the aid of a presumption, and once accomplished the presumption would have had no further effect. In contrast, New York's presumption would have had far more effect, by treating the existence of a fair question of fact as mandating a legal conclusion of accident (shifting the burden of persuasion).

²²⁹ *See Melville v. Am. Home Assur. Co.*, 584 F.2d, 1306, 1311-15 (3d Cir. 1978).

Restatement's language that a non-forum presumption should be applied if the primary purpose of the relevant rule of the non-forum state is to affect the decision of the issue,²³⁰ but it made no attempt to inquire whether this was true as to the presumption of the non-forum state, Delaware, the law of which it chose to apply. The court seemed to think that the task was to determine what the Pennsylvania courts would decide to be the primary purpose of presumptions against suicide *in the abstract*, *i.e.*, disconnected from any particular jurisdiction and from the effect of the presumption on the burdens of proof in each jurisdiction, as if its character as pursuing substantive or procedural goals did not depend on the jurisdiction from which it was drawn.²³¹

The case would have been better and more simply decided had the appellate court followed Judge Becker in focusing on which burden was specified in each state, using that as the indicator of the nature of the law's primary purpose. The appellate court would have found it considerably more difficult to indulge any assumption that there is a primary purpose of presumptions against suicide that is jurisdiction-independent. It would be virtually impossible to ignore the fact that some jurisdictions, like New York, use the presumption to allocate the risk of non-persuasion, while others, like Pennsylvania, use the presumption in the management of the burden of producing evidence. Moreover, using this approach, Delaware's permissive inference would not apply in Pennsylvania, despite the selection of Delaware's substantive contract law; rather, Pennsylvania's permissive inference would apply.²³² Regardless of what the authors of those rules were thinking, that conforms with the functions of permissive inference rules.²³³

²³⁰ *Id.* at 1310.

²³¹ The appellate court also seems to have relied on language in Judge Becker's opinion that suggests he had used the same line of reasoning, but a close examination of his opinion reveals that he considered only New York's presumption to be designed to affect the decision of the issue, in the sense required by the second Restatement. *See Melville*, 443 F. Supp. at 1077-82.

²³² To be sure, both the trial court and the appellate court observed that there was no available guidance from Delaware law on any presumption against suicide in that state, so that both courts indulged the assumption that Delaware's law was the same as Pennsylvania's. *See Melville*, 584 F.2d at 1308. From the perspective of the approach suggested here, this means that the appellate court reached the correct answer for the wrong reason, at least assuming its choice of Delaware contract law was correct.

²³³ *See supra* notes 90-93 and accompanying text.

Once again, such an approach would leave Delaware free to choose how it would want its presumption against suicide to be understood in choice-of-law contexts. If Delaware wants its presumption against suicide to be recognized by the courts of other states adopting the present approach, it would only need to revise its rule to shift the burden of persuasion to the insurer to prove suicide, as was the rule in New York. It would thereby manifest its intention to err on the side of the beneficiary claiming under the life insurance policy, at least on this particular issue. Alternatively, if Delaware's policy is to regulate a jury's permissive inferences, or to place the burden of producing evidence on the insurer, then it doing so should not generate significant concern that other jurisdictions applying Delaware contract law would not necessarily follow suit. Finally, if Delaware had a policy of favoring insured's, and was content to apply it only in litigation arising in Delaware, it could leave its presumption in the form of a permissive inference, if it really thought that permissive inferences would achieve the desired goal.

B. Simple or Defeasible Rules?

It might seem that there is something odd about my proposal. I started by emphasizing a particular proof rule's primary purpose, noting the difference between a rule whose primary purpose is to express the law's preference or hostility towards specific claims or defenses, and a rule whose primary purpose is to fill out a given legal system's compromise among substantively neutral, procedural goals. But my proposal, in some cases, would have courts ignore the *actual* primary purpose in favor of a *presumed* primary purpose, one presumed from the usual purposes associated with the functions of particular proof rules. For the reasons articulated above, however, this is a virtue not a vice, at least in the mine run of cases.

But what about the truly unusual case? Most rules probably are not promulgated with choice-of-law considerations uppermost in mind, and lawmakers might not respond to the signals provided by other states' choice-of-law rules. The question thus presented is whether a forum court ought to have the discretion, similar to that specified in the second Restatement's burden of proof provisions, to go behind the functioning of proof rules to examine legislative history or other indications of lawmakers' primary purpose.²³⁴ In

²³⁴ Of course, the second Restatement does not take this approach consistently.

particular cases, such an inquiry might reveal a serious policy preference for one class of litigants over another, albeit manifested (or even concealed) in a regulation that operates in the usual manner of procedurally neutral rules. If the forum court is unwilling to ignore this mismatch as suggested in the previous section, it might feel impelled to incorporate such a rule together with the substantive law it has chosen to apply, if only to deter forum shopping. The question posed here is this: Is it wise to encourage courts to do this sort of thing? Or would it be better to ignore it, or even to discourage it?

Consider an intentionally extreme example. Suppose the legislative history contains information indicating that the legislature of the hypothetical State of Ama has decided that it wants to discourage medical malpractice suits. This is because leading members of the legislature believe, or so they claim, that malpractice liability is the main cause of increasing costs for the practice of medicine and that such costs are driving physicians out of the state. The legal instrument seemingly chosen to discourage suits is a statutory rule requiring any such action to be supported by affidavits from five physicians licensed in the State of Ama to practice the pertinent specialty and not deriving more than ten percent of their income from testifying as an expert witness.²³⁵ If an action is brought in another state, one following the suggestions presented here, how should that forum state handle such a statute?²³⁶

Rather, it includes a complex mixture of simple rules and rules subject to a discretionary escape clause. To take a couple of random examples, §§ 227 and 246 specify simple rules for adverse possession, selecting the law of the state in which the property is located at the moment adverse possession is claimed to have occurred, while § 146 specifies a defeasible rule for personal injuries, selecting the law of the state where the injury occurred, unless some other state has a more significant relationship to the occurrence and the parties. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146, 227, 246 (A.L.I. 1971).

²³⁵ *Cf.* OHIO R. EVID. 601(E) (limiting the “competency” of expert witnesses in medical malpractice cases based on how much of their time they spend in active clinical practice); OHIO R. CIV. P. 10 (imposing affidavit requirement as condition on medical malpractice suit). The National Conference of State Legislatures provides a compilation of state statutes related to affidavits of merit and expert witness competency for medical malpractice cases. *See* Heather Morton, *Medical Liability/Malpractice Merit Affidavits and Expert Witnesses*, NAT’L CONF. ST. LEGISLATURES (June 24, 2014) <http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.aspx> [https://perma.cc/99S6-NBGN].

²³⁶ Assume for simplicity that all the events associated with the alleged malpractice occurred in the State of Ama and that the plaintiff resides there. Assume also, for the sake of presenting a conflicts problem, that the statute in question does not limit its application

The precise question presented by the choice principles suggested here is whether the affidavit requirement regulates the burden of production or the burden of persuasion. The answer to that question may not be obvious from the statute, because it will depend on how the affidavit requirement is actually implemented. As explained below, there are a number of possibilities, and as Professor Morgan wisely suggested in the context of presumptions,²³⁷ in the absence of a showing by the party inviting application of the non-forum law about its functional effect, the forum court should assume that the requirement serves only Ama's neutral procedural goals.

First, the requirement might be interpreted in Ama to require the plaintiff to present the affidavits in order to avoid immediate dismissal or summary judgment. Perhaps it is further interpreted to require the plaintiff to present at trial the testimony of the affiants (or other similarly qualified experts of the same number) in order to avoid a directed verdict. But once so presented, the fact-finder would employ the usual civil standard of proof, such as proof by a preponderance of the evidence. In such cases, the requirement would affect the burden of production, not the burden of persuasion, because the fact-finder is not required to be persuaded by the experts' testimony beyond what was required before the promulgation of the affidavit requirement.²³⁸ Barring any escape clause, the suggested approach would have the forum court ignore Ama's affidavit requirement, applying instead any such requirement that appears in forum law. Alternatively, the requirement might be interpreted in Ama to require the fact-finder to find for the plaintiff only if the usual civil standard of proof is satisfied *and* supporting testimony of five such experts is introduced

to actions litigated in the State of Ama.

²³⁷ See Morgan, *supra* note 6, at 193 (arguing that, because of the difficulties in determining the effect of presumptions from the available resources, a non-forum presumption should be given effect only when it is ascertainable that the presumption shifts the burden of persuasion).

²³⁸ The distinction at work here is familiar in criminal adjudication. It arises, for example, in connection with the rule that requires evidence corroborating a defendant's extrajudicial confession. See 2 MCCORMICK ON EVIDENCE, *supra* note 12, § 145 (explaining that some jurisdictions treat the rule as a production requirement that conditions sufficiency of the confession, something administered by the trial judge, while other courts treat the rule as effectively altering the standard of proof applied by the jury by requiring the jury to credit the corroborating evidence).

and some number of them credited by the fact-finder. In that case, the burden of persuasion has been altered, and barring any escape clause, the suggested approach would have the forum court apply the non-forum state's rule.²³⁹

The second situation is no more problematic than the application of any substantive policy that the forum court might find otiose.²⁴⁰ However, the first situation seems like it might be an appropriate occasion for the operation of an escape clause, one that would permit the forum court to look beyond the non-forum state's regulation of the burden of production to see if the regulation in question is really designed to implement procedural goals, or if instead it is designed to implement the law's preference for one class of litigants. In deciding whether to include such discretionary authority for the forum court, the basic considerations are the familiar ones: the tension between judicial flexibility to achieve what is considered the best tailored results (here, optimal effectuation of the non-forum state's substantive policies) and the competing values of predictability, uniformity, and efficiency of decision-making. In attempting to answer this recurring jurisprudential puzzle regarding the use of rules,²⁴¹ several factors peculiar to the burden of proof context are worth noting.

On the one hand, choice-of-law rules are not the sort of legal norms on which private citizens generally rely in their primary-conduct decision-making. Most private parties do not contemplate specific litigation, much less where a potential dispute will be litigated or how that will affect the applicable law. This is especially so in the context of rules the impact of which arises only at the point of litigation, including burden of proof rules.²⁴² By minimizing the

²³⁹ A variant of this would arise if the fact-finder were instructed to use the usual civil standard of proof but also were instructed that, in applying the usual civil standard, they should infer that this standard has not been met if the plaintiff's claim is not supported by the testimony of five appropriately qualified experts. This would generate the same choice-of-law result as specified in the text.

²⁴⁰ See FELIX & WHITTEN, *supra* note 4, §§ 67, 68 (discussing the "public policy" objection to applying foreign law). One obvious consideration would be whether it is against the public policy of the forum state to permit another state to require that expert witnesses be chosen from those licensed in the non-forum state.

²⁴¹ See generally LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001).

²⁴² Cf. Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 *FORDHAM L. REV.* 1287, 1290 (2006) (arguing for the importance of predictability in rules primarily directed at private individuals who are inclined to follow the law's directives in their non-

losses associated with frustrated expectations, this consideration opens space for the exercise of ad hoc judicial flexibility. This supports the idea of an escape clause in any choice-of-law rule for burdens of proof.

On the other hand, there are some contexts, primarily contractual, where subtleties like burdens of proof are contemplated by the parties *ex ante*. Insurance contracts provide widespread and obvious examples. While modern conflicts norms generally admit of contractual choice-of-law provisions,²⁴³ this will not provide the desired predictability in the present context. This is because the ability of parties to make such contractual choices is itself delimited by the substance/procedure distinction. The further the issue is toward the procedural end of the spectrum, the less party autonomy is respected.²⁴⁴ Only a clear rule specifying which aspects of the burden of proof are to be taken together with the controlling substantive law would provide such predictability.²⁴⁵ This consideration, therefore, cuts against allowing an escape clause by which the court could attempt to identify, after the fact, the primary purpose of a foreign proof rule.

In addition, allowing such discretion, in contract disputes and in disputes more generally, obviously invites the forum court to seek primary purposes that are potentially at odds with the identifiable function of the non-forum proof rule. In doing so, it presents the possibility of error in such decisions in the sense that the court might

litigation conduct).

²⁴³ See, e.g., Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571, 576 (1999) ("As a result of these developments, the fundamental rule in the United States as well as in Europe today is that the parties to a contract can choose their own law.").

²⁴⁴ See FELIX & WHITTEN, *supra* note 4, § 128, at 436 ("The court may view the issue as procedural and therefore governed by forum law rather than the law chosen [in the contract].") (citations omitted); see, e.g., RLS Assoc., LLC v. United Bank of Kuwait, 464 F. Supp. 2d 206, 215 (S.D.N.Y. 2006) (applying New York choice-of-law principles precluding contractual choice of procedural rules).

²⁴⁵ Case law leaves this somewhat clouded, though it seems to be compatible with the theory articulated here. See, e.g., *Van Muching*, 1986 WL 6303 (taking the burden of persuasion (as well as the right to an award of attorney's fees) as substantive and thus subject to the parties' contractual choice of law; applying the contractually chosen English admiralty law on the burden of persuasion); see also *Woodling v. Garrett Corp.*, 813 F.2d 543, 551-52 (2d Cir. 1987) (rejecting extension of contractual choice of law to "procedural law" including "the question of burden of proof," but so ruling in a context that involved only the burden of producing evidence).

mistakenly identify the primary purpose of the non-forum rule. It is possible, for example, that the actual but unstated purpose of a proof rule matches its function though the stated purpose does not. Even in the extreme example described above, it is possible that Ama's legislators really did not want to make it more difficult for malpractice plaintiffs to recover, that they merely wanted lobbyists for the medical profession to believe they were "doing something." In such cases, using simple rules does a better job than reliance on the stated purpose at bringing purpose and function into better alignment, at least if one discounts a "purpose" like deceiving the medical profession. The main point here is that, in deciding which form of rule is better, one question is whether incurring the risk of errors arising from the attempt to exercise an escape clause is better or worse than the risk of errors that arise from a forum court's application of a simple rule that would not invite such discretionary judgment. The present review of the reported cases suggests that, once courts (or commentators) move away from the security of a focus on which burden is being regulated, they are not particularly good at interpreting the purposes of proof rules.²⁴⁶

Moreover, to the extent that one considers such an alignment to be an advantage, inviting such discretion potentially undermines the pull of simple rules toward a match between stated purpose and actual function. As previously explained,²⁴⁷ refusing to apply a rule that is intended to favor one class of litigants but is expressed and implemented in a procedural form, will provide some incentive for future lawmakers to resist that particular kind of mismatch, bringing purpose and function into better alignment. Once again, lawmakers might ignore this pull. Thus, Ama's lawmakers might choose to avoid such realignment; nothing about Ama's purely domestic litigation would be affected by their doing so. Alternatively, if the

²⁴⁶ See, e.g., *supra* text accompanying notes 191-204 (discussing *DaimlerChrysler* ERISA case) and notes 221-33 (discussing *Melville* life insurance case). The enormous flexibility of the second Restatement's "primary purpose" escape clause would, of course, permit a forum court to apply Ama's affidavit requirement as one intended "to affect the decision of the issue." See *supra* notes 10-12 and accompanying text. But this flexibility comes at a considerable cost: it also permits a court to ignore a non-forum state's allocation of the ordinary burden of persuasion as one intended "to regulate the conduct of the trial." See, e.g., *Babcock v. Chesapeake & Ohio Ry. Co.*, 404 N.E.2d 265, 273 (Ill. App. Ct. 1979) (relying on the Restatement's criterion in rejecting the application of the non-forum state's allocation rule).

²⁴⁷ See *supra* text accompanying notes 215-220.

potential for forum shopping is perceived to be a serious problem, they can eliminate it by their choice of regulatory tool. This, too, argues against discretionary escape valves in the choice-of-law rule: the forum court need only respect the other state's choice about how it wants its proof rule to be understood.

Finally, it is important to remember that the use of simple choice-of-law rules regarding burdens of proof does not preclude the exercise of substantial judicial discretion in the selection of the otherwise governing substantive law. Whatever value there is, for a particular context, in endorsing significant judicial flexibility to take into account governmental interests is very largely preserved by the suggested simple rules. Indeed, simple rules regarding the burdens of proof facilitate the exercise of judicial discretion by adding clarity to the consequences of the choice of substantive law.

To be sure, even defeasible rules based on the distinction between the production burden and the persuasion burden would be a substantial improvement over extant doctrine and, to a lesser extent, over the results of the extant case law. Still, in horizontal choice of law, it is time to try simple rules. The instinct toward ad hoc discretion in choice of law has been strong for decades, and especially so in those jurisdictions that abandoned the traditional approach reflected in the first Restatement, but the pendulum rightly seems to be swinging in the other direction.²⁴⁸ This particular context is a good one for the use of simple rules.

VII. A Brief Glance at Other Choice-of-Law Systems

I have argued that the choice-of-law rule, or at least the default preference, should be that the burden of persuasion on the merits at trial—as to both its allocation and its severity—follows the rules for the selected non-forum law, while the burden of production should follow the law of the forum.²⁴⁹ If this norm is affirmed in American horizontal choice of law, how would this relate to other developed choice-of-law systems? A brief summary is provided here.

In terms of other horizontal choice-of-law frameworks,

²⁴⁸ See SYMEONIDES, *supra* note 1, at 411-19, 426-37. This shift likely will be reflected in the Third Restatement: "As envisioned by the Reporters, the Restatement (Third) will be more rule-oriented than the Restatement (Second)." LITTLE, *supra* note 45, at 630.

²⁴⁹ Once again, a different rule would apply to burdens of persuasion not on the merits, matters that a jury, for example, would not have to resolve. See *supra* note 17.

recognition of the suggested norms by American courts would promote convergence with private international law norms prevailing, or at least emerging, in the rest of the common-law world. While many common-law countries also experience the inertial force of old ideas, such as the right/remedy distinction and the notion that all burdens of proof must be governed by forum law because they are procedural, there is growing acceptance of the idea that burdens of persuasion should be taken together with the *lex causae*.²⁵⁰ On the other hand, regulations of the sufficiency of the evidence continue to be forum-focused.²⁵¹ The connection to the present thesis is even clearer, however, with regard to codified European private international law norms. Under both Rome I (for contractual disputes) and Rome II (for non-contractual disputes), what American evidence scholars usually call the burden of persuasion, as well as presumptions that would shift that burden, are now governed by *lex causae* rather than *lex fori*, whereas the various manifestations of the adversarial concept of the burden of production are considered too specific to a procedural system for such selection.²⁵² Even where these choice-of-law principles are not mandated, they likely will accelerate the trend in the United Kingdom and in other non-member common-law countries.²⁵³

Convergence itself promotes the virtues of uniformity of result and the predictability that this supports. Uniformity of result is served by the common treatment of rules regulating the burden of

²⁵⁰ See GARNETT, *supra* note 3, at 198-99.

²⁵¹ See, e.g., DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 216-19 (15th ed. 2012) (advising that the respective roles of judge and jury are governed by forum law and that “presumptions of fact”—i.e., what in American jurisprudence are called permissive inferences—“have no legal effect at all,” which, though false, does have the happy implication that the question of choosing non-forum law does not arise). To be sure, much confusion persists in regard to true, rebuttable presumptions. See UGLJEŠA GRUŠIĆ ET AL., CHESHIRE, NORTH & FAWCETT, PRIVATE INTERNATIONAL LAW 85 (Paul Torremans ed., 15th ed. 2017).

²⁵² See Regulation (EC) 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 18, 2008 O.J. (L 177/6); Regulation (EC) 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), art. 22, 2007 O.J. (L 199/40); Seibl, *supra* note 178, at 237-39. For a discussion of a subtlety in the wording of these rules, which might make the choice depend on characterization under the *lex causae*, see GARNETT, *supra* note 3, at 200.

²⁵³ Cf. ADRIAN BRIGGS, THE CONFLICT OF LAWS 237-39 (4th ed. 2019).

persuasion.²⁵⁴ And predictability thereby improves from the perspective of various important participants: for states that want to anticipate how their proof rules will be regarded by other states; for litigators who want to anticipate judicial choices; and for the attorneys who need to prepare multi-jurisdictional contracts. Uniformity and predictability are, of course, significant conflicts values.²⁵⁵ They should become dominant when their attainment involves practically no risk of disrupting internal policies of each state and even facilitates international coordination in the recognition of the policy preferences reflected in burdens of persuasion.

Horizontal choice of law has been the primary focus of this Article. But the picture should be completed by a glance at vertical choice of law in the United States. Parity between horizontal and vertical choice regimes is not as important because the goals are different. Nevertheless, some features may be observed. First, to the extent that the suggested norms are endorsed, horizontal choice of law in the United States would converge with vertical choice of law in the treatment of rules regulating the burden of persuasion. For example, a federal court exercising diversity jurisdiction would know that, not only are regulations of the burden of persuasion governed by state law, but in particular by the law of the state otherwise supplying the pertinent rules of contract, tort, and so forth, for the case. Variance between vertical and horizontal choice of law would continue in regard to rules regulating the burden of production, at least insofar as some federal courts adhere to the principle of deferring to state law on such matters.²⁵⁶ This dissonance could be largely eliminated if a consistent federal rule were achieved—whether by the Supreme Court’s or by Congress’s resolving the split in the circuits—recognizing that the issue of the sufficiency of the evidence should be governed by federal standards even in diversity jurisdiction cases.

If such a change in federal law were effectuated, the remaining variance would exist because of a difference between vertical and

²⁵⁴ Of course, a *want* of uniformity of result (with the associated risk of forum shopping) is likely in regard to rules regulating the burden of production, but that is inherent in the reservation of any rules to local control qua procedure, so long as procedural priorities and associated norms vary across jurisdictions.

²⁵⁵ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (A.L.I. 1971).

²⁵⁶ See *supra* notes 150-56 and accompanying text.

horizontal choice principles in the treatment of presumptions that shift only the burden of production. Under the proposed norms of horizontal choice of law, these presumptions would follow forum law. The vertical choice-of-law question is currently answered by Rule 302 of the Federal Rules of Evidence, which has the federal forum defer to state law regarding the effect of presumptions, whether the presumption in question affects the burden of persuasion or only the burden of production.²⁵⁷ This could be addressed by a clarifying amendment of Rule 302, restricting its scope to presumptions in state law that alter the burden of persuasion.²⁵⁸ There is little reason to think that such a change would run afoul of *Erie*.²⁵⁹

The matter is more complicated in the reverse-*Erie* context. Because such cases involve the application of federal law by state courts, there is an important principle of federal preemption involved.²⁶⁰ That principle can require, depending on the particular

²⁵⁷ See FED. R. EVID. 302 (“In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.”).

²⁵⁸ Read narrowly, Rule 302 does not answer the question *whether* to apply a state presumption; it answers only the question of what “effect” is to be given such a presumption once such a choice is made. See *supra* note 257. Theoretically, then, it is open to the federal courts to hold that only state presumptions that affect the burden of persuasion are within the scope of the rule. But so far, federal courts do not seem to have interpreted the Rule this narrowly. See 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §§ 3:13, 3:14 (4th ed. 2013). To be sure, the decision of federal courts applying state substantive law to employ related state presumptions insofar as they affect the burden of production may be explained in terms of simple convenience, as an implicit judgment of *federal* procedural policy, without necessarily invoking the command of Rule 302. If so, a federal court may still choose not to implement such a state rule. Cf. *Richardson v. Matthews*, 882 F. Supp. 6 (Mass. Dist. Ct. 1995) (addressing a Massachusetts statutory presumption that regulated both the burden of production and the burden of persuasion; implementing that portion of the Massachusetts rule that shifted the burden of persuasion; but endorsing the view that uniform federal standards of evidential sufficiency govern even in diversity cases and thus rejecting that portion of the state statute that would constrain the federal trial judge’s decision about whether the evidence was such as to require a jury trial).

²⁵⁹ See generally 21B CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5132 (2d ed. 2005) (discussing Supreme Court case law that acknowledges important federal interests associated with the regulation of the burden of production and opining that Rule 301 gives greater deference to state law than is constitutionally necessary).

²⁶⁰ See generally Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006).

federal law being applied, an application of federal standards of evidential sufficiency.²⁶¹ These norms will preclude complete convergence with the horizontal choice of law norms here suggested. Indeed, some states, following the Uniform Rules of Evidence, have counterparts to federal Rule 302, that defer to federal law regarding presumptions when federal law otherwise controls.²⁶² While it may be convenient to choose to apply federal presumptions that affect only the burden of production, such state rules seem unnecessarily broad; they could be amended to remove presumptions that affect only the burden of production unless required by federal law. In any event, there is a strain of analysis, often controversial even among the judiciary, that indicates a desire for uniformity between federal and state procedures in such cases, at least so long as that requirement does not necessitate a radical restructuring of state procedures.²⁶³ Yet, even here—especially here—the connection between rules governing the burden of persuasion and the otherwise controlling substantive law clearly

²⁶¹ *Compare*, *Wilkerson v. McCarthy*, 336 U.S. 53 (1949) (reversing state court's granting of directed verdict for the defendant in personal injury case arising under Federal Employers' Liability Act), with *In re Globalsantefe Corp.*, 275 S.W.3d 477, 479-81 (Tex. 2008) (holding that state's rules regarding the burden of production—specifically, a requirement of pretrial affidavit filings with expert findings regarding toxic tort causation—apply in Jones Act maritime action tried in state court).

²⁶² *See, e.g.*, N.C.R. EVID. 302 ("In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.").

²⁶³ *See, e.g.*, *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361-64 (1952) (holding, 5 to 4, that the federal right to a jury trial on the issue of the validity of a release of FELA liability applies in state court litigation where, under ordinary state procedures, such an issue would not be submitted to the jury). The Court balanced the need for uniformity of result against the burden on the state, and it qualified its holding by suggesting that the state's procedure might have survived constitutional scrutiny if it had abolished trial by jury in *all* negligence cases. *Id.* at 363. Justice Frankfurter wrote for the dissent, emphasizing that the state's historically-based procedure did not proceed from a desire to inhibit the enforcement of federal rights, and noted that "it multiplies the difficulties and confuses the administration of justice to require, on purely theoretical grounds, a hybrid of State and Federal practice . . ." *Id.* at 368 (Frankfurter, J., dissenting). Indeed, he argued (in terms also pertinent to the theory advanced here) that the majority's holding was acceptable "only on the theory that Congress included as part of the right created . . . an assumed likelihood that trying all issues to juries is more favorable to plaintiffs." *Id.* Of course, there is an important difference between the right to a jury trial per se and the issue of the sufficiency of evidence to warrant trial, whether or not before a jury.

prevails.²⁶⁴

VIII. Conclusion

The subject of horizontal choice of law for burdens of proof involves a peculiar tension. On the one hand, the case law generally reflects a pragmatic distinction between regulations of the burden of persuasion and regulations of the burden of production, with the former being governed by the otherwise applicable substantive law and the latter committed to the forum law in service of neutral procedural goals. On the other hand, one would not infer this from the language appearing in either of the two Restatements or many of the judicial opinions they reflect. As drafters work on future Restatements, they should at least attempt to eliminate this dissonance by bringing the default choice-of-law principles in line with the bulk of the case law.

Beyond that, the next Restatement can and should serve a coordinating function. The adoption of a simple rule—*i.e.*, one without an escape clause—by one American state would create greater predictability for other jurisdictions in terms of how those other jurisdictions want their burden of proof rules to be understood by the adopting jurisdiction. Obviously, the larger the number of jurisdictions that adopt such a simple rule, the greater clarity of message and predictability of impact is provided. By “restating” (and essentially endorsing) such a rule, a future Restatement can thus provide a basis for coordination at the interstate and international level.

There is substantial gain in doing so, and very little loss. On the positive side, each jurisdiction can anticipate and control how potential forum jurisdictions will receive its proof burden rules. The same is true with respect to private parties, such as contracting parties, who want to anticipate which proof rules will be applied by a potential forum jurisdiction. Meanwhile, the forum jurisdiction benefits from a greatly simplified choice-of-law task for burdens of proof. The forum court need only apply pertinent non-forum regulations of the burden of persuasion—its allocation or its severity (standard of proof)—including rules that do so in terms of presumptions or corroboration requirements. Regardless of whether they take the form of permissive inference rules, presumptions, or corroboration requirements, all other regulations

²⁶⁴ See *supra* note 104 and accompanying text.

of the burden of proof—that is, regulations of the burden of production—appearing in non-forum rules can be ignored for choice-of-law purposes. Of course, that does not answer the larger question about whether to apply the substantive law of the non-forum state. Throughout this Article, I have assumed that the answer to that question has been resolved in favor of applying the non-forum law (or that, apart from a difference in proof burdens, the non-forum law that would be chosen is the same as the forum law). Yet, the simple rule approach does at least simplify the larger issue to the extent that it makes clear a part of the non-forum state's law that will be incorporated (and a part that will not) in the event that non-forum law is chosen.

On the negative side is the unusual case when a non-forum jurisdiction has failed to take advantage of its opportunity to control how the potential forum jurisdictions will choose, allowing a mismatch to prevail domestically between the purpose of a proof rule and its typical function. While this kind of case might be addressed in the forum by adoption of a default rule subject to an escape clause, thus allowing the forum court to engage in a search for purpose in the non-forum proof rule, there is, in the extant case law, reason to doubt that courts will be able to exercise an escape clause effectively in order to accurately advance the substantive policies of non-forum jurisdictions. Moreover, encouraging courts to undertake such an error-prone inquiry, aside from consuming judicial resources, undermines the clarity and predictability that make interstate coordination possible.

The rules regarding burdens of proof turn out to present a good context for the use of coordination-facilitating norms for choice of law. Perhaps other rules for which the characterization remains controversial will also be amenable to such treatment.

